

BIENNIAL REPORT  
of the  
ATTORNEY GENERAL  
STATE OF FLORIDA

From January 1, 1947, to December 31, 1948

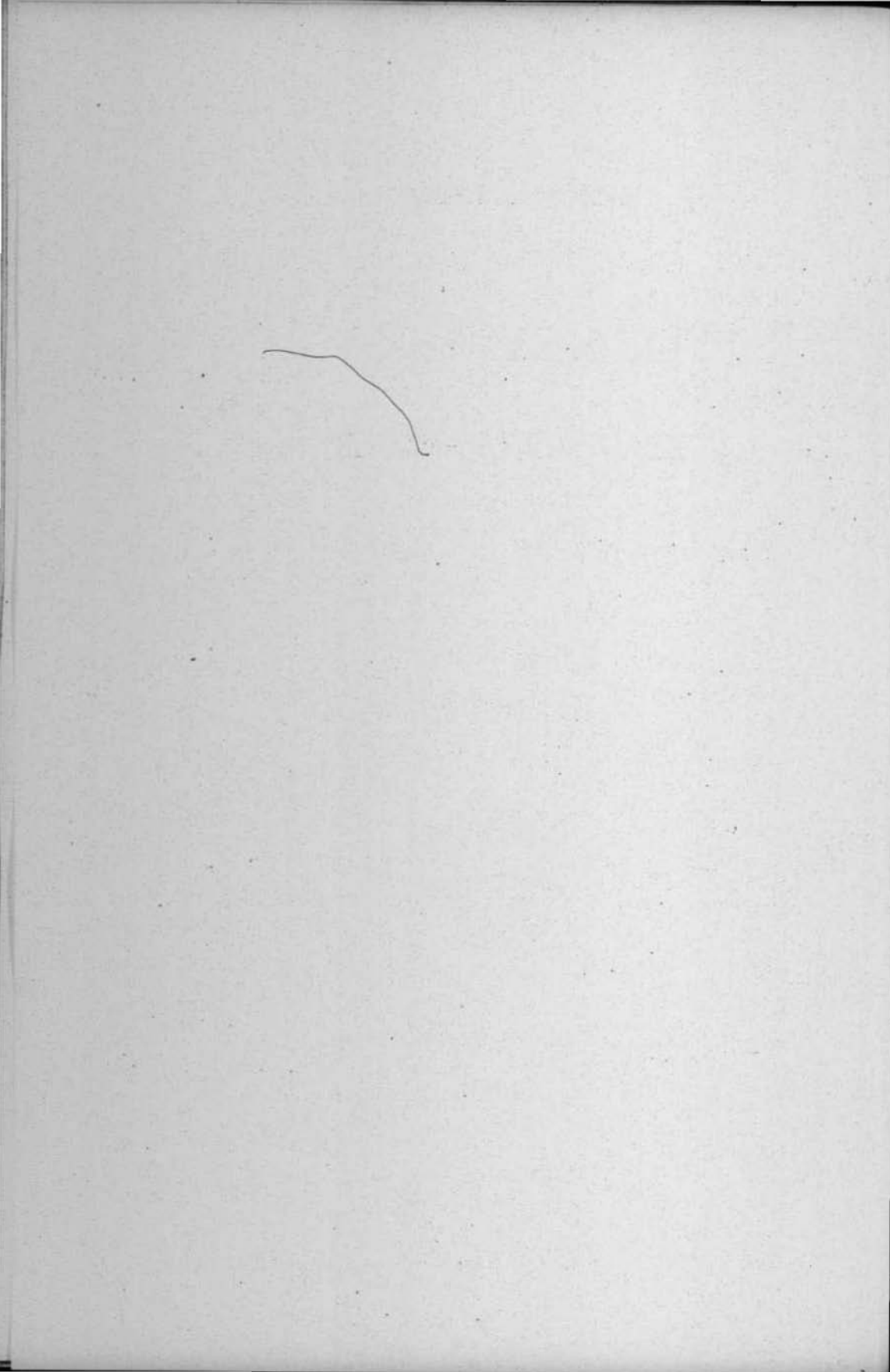
J. TOM WATSON  
ATTORNEY GENERAL



Tallahassee, Fla.

1948





THIS BIENNIAL REPORT CONTAINS:

1. Material required by Article IV, Section 27, of our state constitution to be made by each officer of the executive department to the governor at the beginning of each regular session of the legislature; and,
2. The material required by Section 16.05, Florida Statutes, 1941, to be submitted in a written report to the governor presenting the effect and operation of the acts of the last previous session of the legislature (being the 1947 session), and any court decisions thereon.

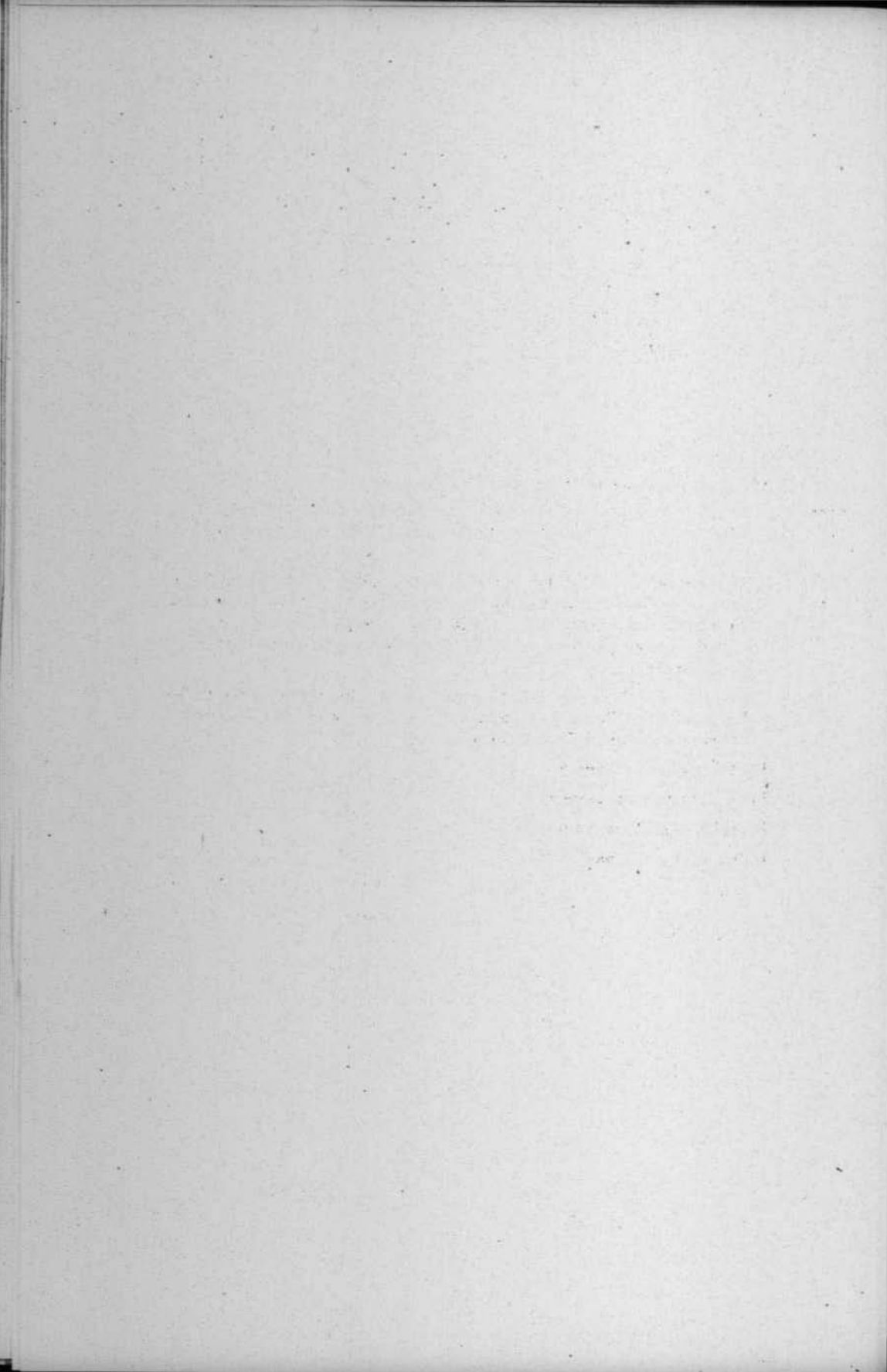
This book will be divided into three parts, the three parts to be designated as Parts I, II and III, table of contents for which appears on pages vii to xiv hereof.

Part I begins on page 9.

Part II begins on page 631.

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OFFICE OF THE  
**ATTORNEY GENERAL**  
**STATE OF FLORIDA**  
**TALLAHASSEE**

January 1, 1949

**J. TOM WATSON**  
ATTORNEY GENERAL

**LETTER OF TRANSMITTAL**

TO HIS EXCELLENCY  
HONORABLE MILLARD CALDWELL  
GOVERNOR OF FLORIDA

SIR:

I have the honor to submit my 1949 report of the two preceding calendar years from January 1, 1947 to December 31, 1948, inclusive. This report is submitted in compliance with section 27, article IV, of the Constitution of Florida, directing that each officer of the executive department make a report of his official acts, the receipts and expenditures of his office, and the requirements of same, to the governor at the beginning of each regular session of the Legislature, or whenever the governor shall require a report. Also submitted herewith is the report, in compliance with section 16.05, Florida Statutes, 1941, directing the attorney general to make a written report to the governor concerning the effect and operation of the acts of the last previous session of the Legislature (being the 1947 session), and any court decisions thereon, with such suggestions as within the opinion of the attorney general the public interest may demand.

This book is divided into three parts as follows:

Part I contains the opinions of the attorney general rendered during the biennium 1947-1948, except those which are repetitions or of such casual character as not to be of general interest. The opinions not published are recorded and indexed in the office of the attorney general, and are available to the public upon request.

Part II is in compliance with the mandate of the constitutional provisions aforesaid and contains:

(a) A statement giving the general scope of my duties along with a list of the departments, commissions and boards of which I am a member.

(b) A statement showing the general scope of work of the statutory revision department of my office.

(c) A compiled statement of the cases handled by the attorney general's office during the biennium.

(d) Extradition statistics presenting cases for extradition reported to the governor by the attorney general during the biennium.

(e) The receipts and expenditures of the attorney general's office for the biennium with an itemized statement of my appropriations and expenditures.

(f) The collections made by the attorney general's office during the biennium.

(g) A list of the attorneys general of this state since 1845.

(h) A list of the boards, commissions and bureaus of the state, for many of which the attorney general acts as attorney and legal advisor.

Part III deals with (a) the constitutional amendments adopted at the 1948 general election; (b) the 1947 legislative enactments of general operation and interest; (c) court proceedings and decisions rendered during the biennium, which relate to or arise out of the above constitutional amendments and legislative enactments which are of unusual interest.


I have taken the liberty of listing, in this part of the report, the personnel of my office, the membership of the Florida Supreme Court, the names and circuits of the circuit judges, the names of the judges of the Court of Record of Escambia County, the Court of Crimes of Dade County, the criminal courts of record, the civil courts of record, the juvenile courts and the county judges; the names and circuits of the state attorneys and assistant state attorneys, the names and counties of the county solicitors, assistant county solicitors and county prosecuting attorneys.

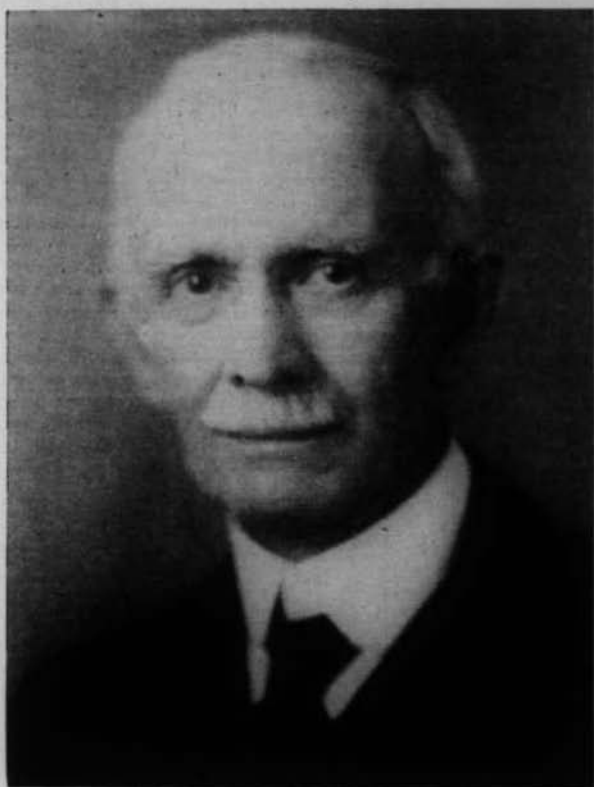
There is also contained in this section reports obtained from the clerks of the circuit court, the clerk of the Court of Record of Escambia County, and the clerks of the civil courts of record of the cases handled in their courts; reports obtained from the state attorneys and county solicitors showing the cases handled in the circuit courts, the criminal courts of record and the court of crimes of the state.

Respectfully submitted,

J. TOM WATSON

Attorney General





## In Memoriam

### JAMES BRYAN WHITFIELD

Born—Wayne County, North Carolina, November 8, 1860

Died—Tallahassee, Florida, August 21, 1948.

James Bryan Whitfield was born in Wayne county, North Carolina, November 8, 1860, and died in his sleep at his home in Tallahassee, Florida, August 21, 1948, at the age of eighty-seven. Interment was made in the Episcopal cemetery, Tallahassee. Immediate survivors are his widow, Mrs. Margaret Randolph Whitfield, two daughters, Miss Mary Croom Whitfield and Mrs. Clarence Neeley, both of Tallahassee; three sons, John Nash Whitfield of Jacksonville, James Bryan Whitfield, Jr., of Tallahassee and Randolph Whitfield of Atlanta; a brother, B. C. Whitfield, and a sister, Miss Mary T. Whitfield, both of Tallahassee.



James Bryan Whitfield, son of Richard Allen Whitfield who was a confederate soldier, and Mary Croom Whitfield, was born on his father's plantation near Goldsboro, North Carolina.

He attended the West Florida Seminary and the law school of the University of Virginia, from which he graduated with the degree of Bachelor of Laws in 1886. He was admitted to the bar in Tallahassee, had a working connection in the office of Senator Duncan U. Fletcher and Augustus King of Jacksonville, Florida, for a short time, and then commenced the practice of law in Tallahassee. In 1888 he was appointed secretary to Governor E. A. Perry. In November, 1888, he was elected county judge of Leon county but resigned in March, 1889, to accept appointment as clerk of the Supreme Court of Florida. He was appointed state treasurer by Governor William D. Bloxham in 1897, and was elected to that office in 1898 and in 1900. In February, 1903, he was appointed Attorney General of Florida by Governor William S. Jennings. He was elevated to the supreme court on February 15, 1904, by Governor Jennings where he was continued by election to January 4, 1943, at which time he retired. Justice Whitfield was designated chief justice in 1905, 1909, and 1935.

He reported the proceedings of the Constitutional Convention of 1885, was recording clerk in the Senate, session of 1887, and was cashier of the Sub-Tropical Exposition at Jacksonville in 1888. He served on commissions appointed by Governor Albert W. Gilchrist in 1909, and by Governor John W. Martin in 1925 to rewrite the procedural laws of the State of Florida. He was author of chapter 1328, acts of 1895, authorizing the use of the Australian Ballot System now known as the General Election Law; and also author of chapter 6471, acts of 1913, providing for the election of United States senators by popular vote.

Justice Whitfield's tenure as justice of the Supreme Court of Florida was almost thirty-nine years, the longest in the history of that court and one that has been rarely equalled in this country. He prepared more opinions than any justice who had ever been a member of the Florida Supreme Court, many of these opinions have become the leading case law of this state. *State ex rel. Ellis vs. Atlantic Coast Line*, reported in 53 Fla. 650, was the pioneer case in this country holding that a public service corporation could be required to keep its roadbed and rolling stock in condition. *State vs. Atlantic Coast Line*, reported in 56 Fla. 617, treating the subject of legislative and administrative powers, has been quoted and followed more by the Supreme Court of Florida and other courts than any other opinion written by Justice Whitfield.

Justice Whitfield's tenure on the court covered the most interesting period in our state and country's history. His opinions commence in 47 Florida Reports and are concluded in 150 Florida Reports. Over one hundred volumes of Florida Reports register his philosophy of the law. His culture, his profound learning, and his simple urbanity constantly drew governors, legislators, cabinet members, and judges to him for counsel, and through them and his opinions, he had more to do with directing the current of the law than any single

person in the history of this state. In fact, few judges in the history of the country have so greatly influenced legal trends. He was in every sense a great craftsman of the law whose social response was not dulled by use.

Fidelity to his state, his faith in democracy, and his devotion to our constitutional theory may be pronounced as his compelling traits. His opinions on constitutional questions have enriched the fundamental law of the land with a significance that will make them a precious heritage to future generations of the bar. To him the constitution was a living reality to be interpreted by the light of reason as if promulgated today. He was a vigorous defender of constitutional guaranties but gave no encouragement to the theory that the constitution was cast in a straight jacket to bind the present by the outmoded philosophy or caprice of the past.

The Bible and the constitution were his guide to moral and legal excellence; from them he extracted his concept of the dignity of the individual and his love for the common man. To him the law was a rule of social conduct binding the great and the small alike.

After retiring from the supreme court, Justice Whitfield devoted his time at home to the continued service of his state in revising, supplementing and bringing up-to-date, for state uses, the political and legal history of Florida. He supplied the necessary material for Whitfield's notes, the legal historical background of the State of Florida contained in volume III, Florida Statutes, 1941, entitled "Helpful and Useful Matter." He was also engaged in preparing for preservation and placing in safe repositories historical records and items of value to the state collected during his sixty years in the state's service. In 1945, he gave his law library towards the establishing of a Leon County Law Library at the court house where he and his father had both served as county judge.

In 1945, Justice Whitfield was conferred with an honorary degree of LL. D. by the University of Florida. He was an honorary member of Phi Alpha Delta legal fraternity; a member of the Florida Historical Society for many years; a charter member of the Tallahassee Historical Society and a contributor to their publications. He was chairman of the Bloxham Centennial in 1935, a member of the Florida Centennial Commission in 1944; a life long member of St. John's Episcopal Church, Tallahassee, and for a time its senior warden; a member of the Florida Bar Association; a life long loyal democrat.

Mr. Justice Whitfield was "every whit" a great judge; no judge in Florida has ever been more generally beloved and respected for his integrity, modesty and personal charm. His learning, culture and temperament made him a great cornerstone to, and bulwark for, the present legal structure of our state.

We shall miss him greatly but the light of his influence will linger long in its beneficent contribution to the path of progress.



## In Memoriam

### WILLIAM HULL ELLIS

Born—Pensacola, Florida, September 17, 1867.

Died—Jacksonville, Florida, April 14, 1948.

William Hull Ellis was born in Pensacola, Florida, September 17, 1867, and died following a lingering illness in Jacksonville, Florida, at the age of eighty-one. Interment was made in the Eastern Cemetery, Quincy, Florida. Immediate survivors are his widow, Mrs. Ena Taylor Ellis; three daughters, Mrs. Herbert Clark, Winter Park, Florida, Mrs. James Whitehurst, Brooksville, Florida, Mrs. Harry Schad, Gainesville, Florida; two sons, W. H. Ellis, Orlando, Florida, M. H. Ellis, Jacksonville, Florida.

William Hull Ellis was the son of Charles H. Ellis, a confederate soldier, and Julia W. Ellis.

He graduated from Quincy High School and attended business college at Atlanta, Georgia, preparing himself to be an accountant. He had no formal education in the field of law. He won his admission to the bar of Florida in 1889. He acquired the necessary knowledge to stand the bar examination by reading in the law offices in Quincy, Florida, while he continued to work as an accountant. He began the practice of law by forming a partnership with the Honorable E. C. Love who later became a circuit judge.

He was the author of chapter 5119, Laws of Florida, 1903, which created the office of state auditor and was appointed as the first incumbent to the office; he served during 1903 and 1904. In 1904, he was appointed attorney general to fill an unexpired term, was then elected to serve a full term, and served until 1909; at the end of this term he returned to the private practice of law, reopening his law office in Quincy, Florida. In 1911, Mr. Justice Ellis became general counsel for the Trustees of the Internal Improvement Fund and continued in that capacity until 1915. He was elected to the supreme court in 1915 and was reelected without opposition in 1920, 1926 and 1932. He served as chief justice from 1926 through 1929 and during 1937 and 1938 at which time he retired due to failing eyesight and ill health.

The outstanding feature of his service as attorney general was the celebrated case of State ex rel. Ellis vs. Atlantic Coast Line, reported in 53 Fla. 650, which was the pioneer case in this country holding that a public service corporation could be required to keep its roadbeds and rolling stock in good condition. As attorney for the Trustees of the Internal Improvement Fund, he rendered an opinion that required the payment of twenty-five percent of the proceeds received from the sale of public lands, by the Trustees of the Internal Improvement Fund, to be applied to the common school fund; this opinion was closely followed by the supreme court in a later decision. Mr. Justice Ellis is credited as the author of the drainage laws which made possible the development of the everglades.

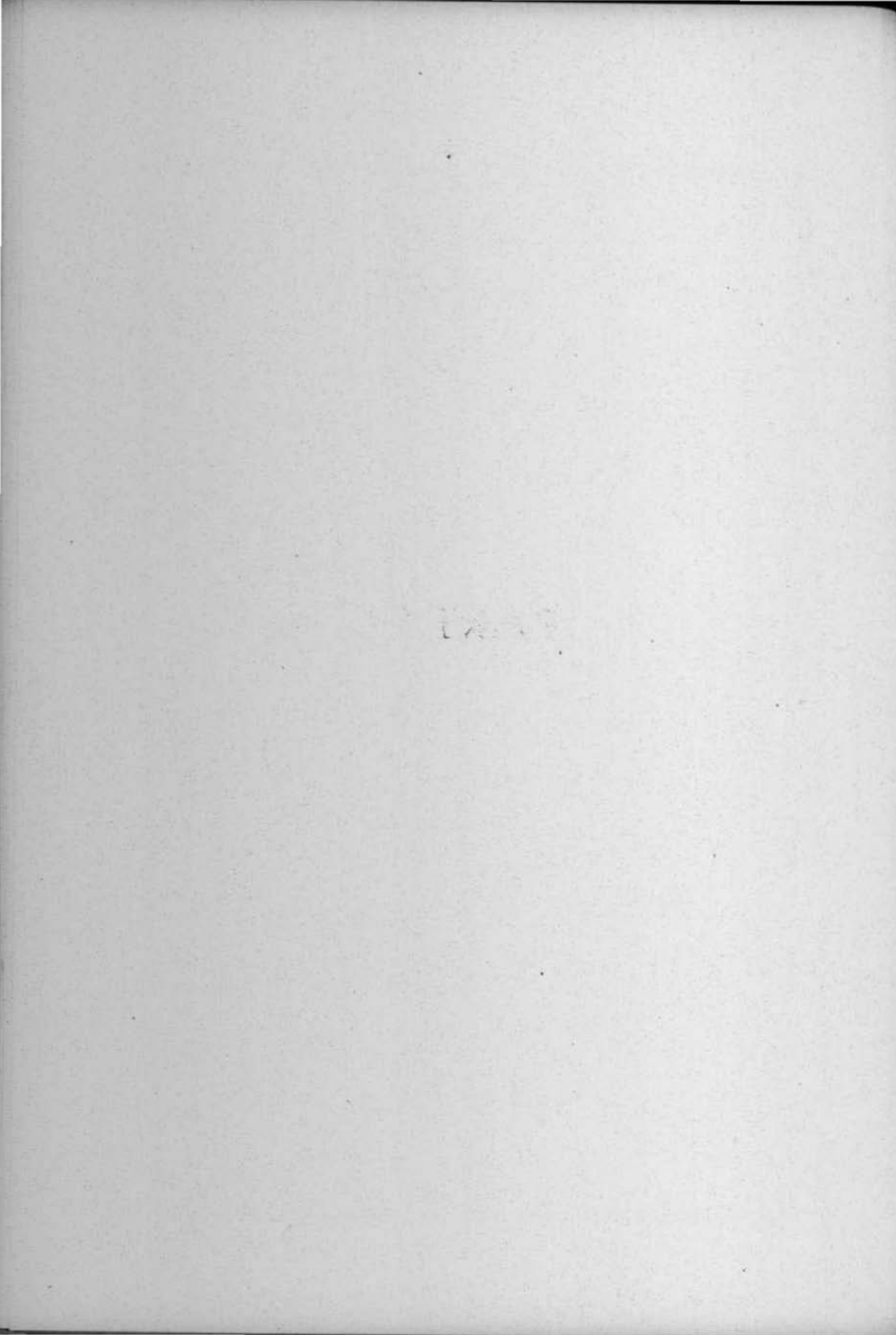
Mr. Justice Ellis was a member of the Episcopal Church, Elks, Masons and Knights of Pythias. He was grand chancellor of the Knights of Pythias in 1895 and a member of the supreme tribunal from 1906 to 1911. He was a member of the Florida bar from 1889 until his death; in 1919 he served as president of the Florida Bar Association. He was a member of the Phi Gamma Mu and an honorary member of the Phi Alpha Delta, legal fraternity. In 1937, he was conferred with an honorary degree of LL. D. by Stetson University, DeLand, Florida.

During Justice Ellis' long period of distinguished public service, as attorney general, attorney for the Trustees of the Internal Improvement Fund and as a member of the Florida Supreme Court he wrote many outstanding opinions. He was thorough and sound in his opinions; his courage of these convictions increased as the years added to his tenure on the bench. At the time of his retirement he was an accredited legal

scholar and interpreter of the highest standing. Mr. Justice Ellis was a devoted apostle of good, sound, well-reasoned law, intelligent and unusually competent; his views were from a mind of singular integrity. He was much beloved by, and a favorite judge of, the lawyers of Florida.



# **PART I**



## CHAPTER I

### STATE ORGANIZATION

#### ADMISSION INTO UNION; STATE BOUNDARIES

March 19, 1947.—047-82.

#### FEDERAL LAND JURISDICTION—DESCRIPTION

QUESTIONS: 1. Is a boundary description, showing courses and distances, essential to meet requirements of section 6.04, Florida Statutes, 1941, for a "convenient metes and bounds" description to accompany an application for federal jurisdiction with respect to 459,518.648 acres embraced in Eglin Field military reservation, heretofore acquired by the United States through conveyances setting forth said land under regular government land survey descriptions?

2. If the answer to the first question is negative, then what type of description will satisfy the requirements of the statute?

3. What type of description in a deed ceding federal jurisdiction will satisfy requirements of the statutes?

4. Is the validity of a deed ceding federal jurisdiction subject to later attack on the grounds only that the application made to the governor was not in strict compliance with the statute?

*To Mr. Gordon Britton, Division Real Estate Officer, Office of the Division Engineer, War Department, Atlanta, Georgia:*

Regardless of the apparent effect of certain of the comparatively few authorities available on the meaning of a "metes and bounds" description as used in a statute, the instant question involves legal and practical considerations not to be ignored.

If now, it were desired to run the perimeter of the tract in question, any described survey of such perimeter would be required to accord with the government survey of the section boundaries involved. Yet it is not unusual for surveyors using government field notes to vary in their location of the same section line; and it is further recognized that by consent and occupancy the dividing line between adjoining owners may vary from a line in pursuance of government survey which it is understood to follow and yet become an established line. Whether any given survey line constitutes the correct boundary line is always a matter of fact to be determined by a jury, in event of dispute. A present survey of the perimeter of the tract in question would not, in event of dispute, conclusively establish the boundary it would purport to fix. The very important matter of jurisdiction is under consideration, and certainty of boundary is required; but reasonably there would seem to be contemplated no greater certainty than required for county boundaries in this state as found in chapter 7, Florida Statutes, 1941. Indeed, the mode followed in describing the boundaries of counties appears to be the most certain that may be employed under existing laws.

There are no Florida decisions directly on the point here involved. The foregoing conclusions and the answers below would seem reasonably to follow a consideration of the authorities mentioned. On the question of the meaning of a "metes and bounds" description, see the following: (Black's Law Dictionary, Third Addition, page 1183; Moore vs. Walsh, 37 R. I. 436, 93 A. 355; Grand Lodge of the Order of the Sons of Hermann vs. Curry, et al., (Tex.), 108 S. W. 2d 574; Mesquite Independent School District vs. Gross, (Tex.), 67 S. W. 2d 243; Lifer vs. City of Dallas, (Tex.), 177 S. W. 2d 231). On the significance of government land surveys in Florida and the



present location thereof, see the following: (Kirsch vs. Persinger, 87 Fla. 364, 100 So. 166; Sanders vs. Alford Bros. Co., 92 Fla. 718, 111 So. 278; Delaware Securities Corporation vs. Kahn, 129 Fla. 26, 195 So. 779; Craig vs. Russell, 141 Fla. 105, 192 So. 457).

In view of the foregoing, in my opinion the questions are properly answered in their numbered order as follows:

1. Under said section 6.04, a boundary description of a tract based upon a present survey showing courses and distances is not required to meet the requirements of such law for a "convenient metes and bounds" description to accompany application for ceding of jurisdiction over such tract to the United States, as in said law provided.

2. A description of such boundary based upon the outside section or fractional section lines or U. S. lot lines according to government survey, which lines form the unbroken perimeter of such tract, meets the "convenient metes and bounds" description required by said section 6.04.

3. A description in a deed ceding federal jurisdiction which sets forth the boundary of the tract in question as suggested in the answer to question 2 above is sufficient.

4. The description in a deed ceding federal jurisdiction would properly follow the description in the application therefor. The validity of such a deed is subject to later attack if application therefor is not in strict compliance with the statute.

## CHAPTER II

### LEGISLATIVE DEPARTMENT

#### LEGISLATION

May 6, 1947.—047-119.

##### ATTACHES—COMPENSATION—INCREASE

**QUESTION:** Is there any authority in sections 11.12 or 11.14, Florida Statutes, 1941, or any other law, for increasing compensation of attaches, as now fixed by law, of either of the two legislative houses by resolutions of the respective houses?

*To Honorable J. Edwin Larson, State Treasurer:*

There appears to be no authority in said sections 11.12 or 11.14 or in any other law for increasing compensation of attaches, as now fixed by law, by resolution of the respective houses of the Legislature. This answer is made subject to any possible change or amendments of such laws which may have been effected at this session of the Legislature.

March 11, 1948.—048-93.

##### HOUSE OF REPRESENTATIVES—ENROLLING AND ENGROSSING COMMITTEES—CHIEF CLERK

**QUESTIONS:** 1. Is there any constitutional or statutory requirement that the House of Representatives have engrossing and enrolling committees?

2. If there is no constitutional or statutory requirement for engrossing and enrolling committees, may the house add the duties heretofore performed by such committees to the duties now performed by the chief clerk of the house?

3. Is there any constitutional or statutory requirement that engrossing and enrolling reports to the house be spread in full upon the journals of the house, showing in detail the full title of bills and resolutions, or may these reports be shown simply by their official number purely for information?

*To Mr. Allen Morris, Capitol Building:*

It appears from the 1947 house journal that you were appointed, by house resolution No. 38 of the 1947 session of the Legislature, to undertake the task of rewriting the rules of procedure of the house, in cooperation with the 1947 chief clerk of the house. The request for opinion appears to be pursuant to this assignment.

Under section 6, article III, of the state constitution, "Each house shall . . . determine the rules of its proceedings." House committees are recognized by the constitution (see section 10, article III) but are not designated. The house is required to "keep a journal of its own proceedings" (see section 12, article III). Although this journal is required to show certain things (see sections 12, 17, 21 and 28, article III, sections 1 and 2, article XVII), nowhere in such journals is there any requirement that reports of committees be entered in full upon the journals. Not a single committee is named or expressly provided for by the constitution.

Although legislative committees are recognized by the statutes (sections 11.06, 11.08, 11.09, 11.10, 11.11 and 15.06, Florida Statutes, 1941), nowhere in such statutes are they expressly provided for. The said statutes

make no mention of engrossing bills and resolutions or of engrossing committees. Section 11.07, Florida Statutes, 1941, provides that "all bills and joint resolutions . . . shall be duly enrolled . . . by the enrolling clerk . . . before they shall be presented to the governor or filed in the office of the secretary of state." No mention is made in the statutes of an enrolling committee.

The Legislature has inherent power to prescribe rules of procedure and provide for committees to aid and assist it in its work (49 Am. Jur. 248, section 30; 59 C. J. 92 and 95, sections 67 and 74), so long as such rules and committees do not violate express constitutional and statutory provisions. It is held in some states that private citizens as well as members of the Legislature may be made committee members (see 59 C. J. 95, section 76). Where the constitution and statutes do not regulate the manner in which bills are referred to in the journals it is not essential that the journal contain either the title or body of the bill, but it is usually held sufficient for the journal to describe the bill by number or other designation sufficient to identify the bill with reference to the proceedings had upon it. (See 59 C. J. 573, section 95.)

In the light of the foregoing it seems that: (1) there is no constitutional or statutory requirement requiring that the House of Representatives have either an engrossing or an enrolling committee; (2) there is nothing in the constitution or laws of this state that would prevent the house from charging the chief clerk with the performance of the duties now performed by the engrossing and enrolling committees; and (3) there is no constitutional or statutory provision requiring that reports of the engrossing and enrolling committees be spread in full or that they show in detail the title of bills and resolutions; the said journal entry need not be in detail but should describe the bill or resolution with sufficient certainty to identify such bill or resolution.

May 29, 1947.—047-144.

#### HOSPITALS—FEDERAL AID—REQUIREMENTS

QUESTION: Please advise the need for house bill No. 257, and whether or not regulation of all hospitals in the state is required in order for this state to receive federal aid for hospitals under the "Hospital Survey and Construction Act."

*To Honorable Raymond Sheldon, State Senator:*

Without going into the question of the effect of house bill No. 257 or its effect, if amended, to restrict its operations to those hospitals receiving federal aid under said act, I quote the following relevant part of such act (section 291f (10) (d), title 42, U.S.C.A.):

"(d) If any state prior to July 1, 1948, has not enacted legislation providing that compliance with minimum standards of maintenance and operation shall be required in the case of hospitals which shall have received federal aid under this title, such state shall not be entitled to any further allotments under Section 291g of this title."

Thus, it would seem that on this feature to meet the provisions of this federal act, there is required only legislation governing the subjects mentioned in said quoted law for hospitals receiving federal aid under said law. Other requirements for state legislation under said federal act are concerned with hospitals receiving federal aid.

## CHAPTER III

### EXECUTIVE DEPARTMENT

#### STATE TREASURER

January 29, 1948.—048-22.

#### PUBLIC FUNDS—SECURITY—INTERNATIONAL BANK BONDS

**QUESTION:** Are International Bank for Reconstruction and Development bonds, as described in the prospectus of said bank concerning proposed issues bearing date of July 15, 1947, acceptable (1) as security for deposit of public funds, or (2) for investment of public funds?

*To Honorable J. Edwin Larson, State Treasurer:*

The prospectus announces that the bonds will be the direct unsecured obligations of the bank, and that they will state on their face that they are not the obligations of any government.

The laws of Florida prescribe the types of securities acceptable to the state, its departments and agencies for securing deposits, and for investment of funds. An examination of the statutes of this state pertaining to such matters results in the conclusion that the bonds described are not acceptable for the purposes mentioned in the question. Hence, the question is answered in the negative.

August 8, 1947.—047-267.

#### STATE FUNDS—SAFEKEEPING RECEIPT—FORM OF RECEIPT

**QUESTION:** Does the form of safekeeping receipt now issued by the Federal Reserve Bank of Atlanta, in pursuance of operating circular No. 20, promulgated by said bank on September 1, 1946, with respect to securities pledged to the state treasurer of Florida by a depositing bank to secure deposits of state funds in the latter bank, meet the requirements of section 18.11 (2), Florida Statutes, 1941, as amended by chapter 23938, Laws of Florida, acts of 1947?

*To Honorable J. Edwin Larson, State Treasurer:*

For the purposes of information in connection with this subject, attention is directed to opinion of this office, No. 046-438, dated October 23, 1946, addressed to the state treasurer.

Prior to the amendment of section 18.11 (2) by chapter 23938, said section prescribed, among other things, that the state treasurer might accept in lieu of such securities a safekeeping receipt from a bank in which such securities had been deposited, and that said safekeeping receipt should "substantially comply with the following form and provisions" of the safekeeping receipt set forth at length in the statutes.

Chapter 23938 amended section 18.11 (2) by adding thereto an additional paragraph, providing in effect, that a safekeeping receipt issued for the purpose contemplated by section 18.11 (2) by any federal reserve bank should not be required to comply as to form with the form of safekeeping receipt set forth in said section, if any such receipt which does not comply as to form with the prescribed statutory form has been authorized for the use of said bank by its governing authority and if the provisions thereof comply in substance with the provisions of said prescribed form of safekeeping receipt.



A study of the provisions of the form of safekeeping receipt now used by the Federal Reserve Bank of Atlanta in pursuance of said operating circular No. 20, and the form of safekeeping receipt set forth in said section 18.11 (2) leads to the conclusion that the provisions of the former comply in substance with the provisions of the latter.

It is here noted that the form of such receipt now issued by the Federal Reserve Bank, and copy of said operating circular No. 20, are filed in this office with the correspondence. It is assumed without question that operating circular No. 20 and form of safekeeping receipt issued in pursuance thereof were promulgated by or authorized for the use of said bank by the governing authority of said bank.

However, attention is directed to the concluding sentence of said operating circular No. 20 which is quoted as follows: "This bank reserves the right to withdraw, add to, or amend at any time any of the provisions of this circular." Since the terms and conditions of the circular are made a part of the safekeeping receipt issued in pursuance thereof, it would seem that this provision of the circular presents an obstacle to the acceptance by the state treasurer of the form of safekeeping receipt issued in pursuance of the circular.

In view of the foregoing, in my opinion, the question is properly answered as follows:

The provisions of the safekeeping receipt currently issued by the Federal Reserve Bank of Atlanta, in pursuance of its operating circular No. 20, comply in substance with the provisions of the form of safekeeping receipt set forth in said section 18.11 (2). However, since said operating circular No. 20 reserves in the bank the right to withdraw, add to, or amend at any time any of the provisions of said circular, such a receipt issued in pursuance of the circular would not appear to be acceptable to the state treasurer unless the terms of said receipt, or operating circular No. 20, shall provide that any such withdrawal, addition to, or amendment of the provisions of such circular shall not affect or impair the validity of safekeeping receipts and the provisions thereof outstanding on the date any such action is taken.

(See 048-61)

October 22, 1947.—047-346.

#### SAFEKEEPING RECEIPT—EFFECT OF WITHDRAWAL OF CIRCULAR

QUESTION: In my opinion No. 047-267, dated August 8, 1947, to the state treasurer, I held that the form of safekeeping receipt of the Federal Reserve Bank of Atlanta, in pursuance of its operating circular No. 20, was acceptable under section 18.11 (2), Florida Statutes, 1941, as amended by chapter 23938, acts of 1947, but for the concluding clause of such circular by which the bank reserved the right to withdraw, add to, or amend at any time any of the provisions of the circular. The president of the bank has advised the state treasurer it is their construction of such concluding clause that should the bank withdraw, add to, or amend any of the provisions of said circular, such action should not affect receipts then outstanding. Does such construction of said concluding clause by the bank remove the obstacle urged in the aforesaid opinion?

To Honorable J. Edwin Larson, State Treasurer:

The clause objected to in said circular is quoted as follows:

"This Bank reserves the right to withdraw, add to, or amend at any time any of the provisions of this circular."

A part of such letter from the president of the bank to the state treasurer is quoted as follows:

"In order to clear up any questions which may exist concerning this provision of the circular, we wish to advise that we place upon it the following meaning:

"In the event that the Federal Reserve Bank of Atlanta may find it advisable to withdraw, add to, or amend the circular, the safekeeping receipts and the provisions thereof, issued by the Federal Reserve Bank of Atlanta prior to, and outstanding at the time of, such amendment, addition, or withdrawal shall not be affected or impaired thereby, but shall be governed by the terms and provisions of the circular outstanding at the time they were issued in the same manner and to the same extent as they would be if the operating circular had not been amended, added to, or withdrawn."

In the aforementioned opinion, I assumed without question that operating circular No. 20 and the form of safekeeping receipt issued in pursuance thereof were promulgated by or authorized for the use of said bank by the governing authority of the bank; and I further assume here without question that the interpretation placed upon the concluding clause in the letter of the president of the bank has been approved by or is in pursuance of authority vested in him by the governing body of the bank.

In my opinion, the obstacle presented by the concluding clause of operating circular No. 20, as mentioned in the aforesaid opinion, has been removed by this construction of such features by the bank; hence, in my opinion the form of receipt of the bank issued in pursuance of such circular meets the requirements of section 18.11 (2), as amended.

(See 048-61)

December 24, 1947.—047-429.

#### SAFEKEEPING RECEIPT—FEDERAL RESERVE BANK

QUESTIONS: 1. Is the current form of safekeeping receipt of the Federal Reserve Bank of Atlanta, in pursuance of operating circular No. 20, issued for said bank by its president on September 1, 1946, authorized for the use of said bank by the governing authority of said bank?

2. Was the construction of the last paragraph of said operating circular No. 20 by the president of said bank, in his letter to the state treasurer of Florida (see my opinion No. 047-346), authorized by the construction of the governing authority of said bank?

*To Honorable J. Edwin Larson, State Treasurer:*

The questions arose from uncertainty of the state treasurer as to the meaning of a part of my opinion No. 047-346; the relevancy of these questions may be obtained by reference to opinions numbered 046-438, 047-267 and 047-346.

The Federal Reserve Bank of Atlanta is conducted under the supervision and control of its board of directors. (Title 12, section 301, U.S.C.A.) The president of the bank is its chief executive officer. (Title 12, section 341, U.S.C.A.) The attorney for the bank advises that operating circular No. 20 was issued by the president of the bank pursuant to general authority granted him, as chief executive officer of the bank, by its board of directors, under article III, section 4, by-laws of the bank, as follows:

"The president shall be the chief executive officer of the bank, and all other officers and all employees of the bank shall be directly responsible to him. He shall have general charge and control of the business and affairs of the bank, subject to such limitations as the board of directors may from time to time prescribe, and shall have power to prescribe the duties of all other officers and agents of the bank in cases where such duties are not

specifically prescribed by law or by these by-laws or by action of the board of directors. The president may suspend or remove any employee of the bank."

The attorney for the bank refers to the foregoing provision of law prescribing that the president of the bank is its chief executive officer; and advises further that the board of directors of the bank has not prescribed any specific form for any circular, including operating circular No. 20; nor has the board prescribed any rules or requirements whatsoever for issuance or construction of any such circulars; and that the aforesaid construction placed by the president on said operating circular No. 20 was in pursuance of the general authority granted him by the board as chief executive officer of the bank.

The statutory form of safekeeping receipt set forth in section 18.11 (2), Florida Statutes, 1941, as amended, does not attempt to fix the degree of care required of the bailee. Operating circular No. 20 sets forth the measure of care chargeable to the bank with respect to securities held under the current form of receipt, as follows:

"The bank will exercise, with respect to the securities which it holds in custody for the account of a public body or public official, only that diligence with which it cares for its own property, and it will not be liable for any loss to such securities when such loss is due to any cause other than a lack of such diligence."

While the courts are practically uniform in their holding that a gratuitous bailee is liable, so far as failure to exercise care is concerned, only for gross negligence (e.g., *O'Brien vs. Vaill*, 22 Fla. 627, 1 So. 137), they are not uniform as to what "gross negligence" connotes. Some hold it contemplates that degree of care which even the most inattentive persons never fail to take of their own concerns; others require that care which a bailee takes of his own property; others require that care which a prudent man should give his own property; others require the bailee to exercise ordinary care and diligence; and yet others require reasonable care. It is recognized that the circumstances, parties, and nature of the bailment are factors in each case bearing upon the degree of care required; nevertheless, it appears the authorities are not uniform upon the subject. (E.g., *Cadwell vs. Peninsular State Bank*, 195 Mich. 407, 62 N.W. 89; *Boyd vs. Bank of Cape Fear*, 65 N.C. 13; *Merchants' National Bank vs. Guilmartin*, 93 Ga. 503, 21 S.E. 55; *First National Bank vs. Ocean National Bank*, 60 N.Y. 278, 19 Am. Rep. 181; *Preston vs. Prather*, 137 U.S. 604, 34 L. Ed. 788.)

The president of the bank, in promulgating operating circular No. 20, not only provided the conditions under which the bank would hold the securities contemplated by the receipt, but fixed the measure of care chargeable to the bank, i. e., the liability of the bank, and thus a rule of law. It may be that the president of the bank, as its chief executive officer, and under the aforesaid provisions of the bank's by-laws, has the power to fix the bank's liability in a controversial field of law. However, respectable doubt exists of this exercise of power by the president, particularly in view of the law which charges the board of directors with the supervision and control of the bank. However, more than a year has elapsed since operating circular No. 20 was promulgated, and any doubt as to such president's power has been removed by the apparent acquiescence of the board of directors with respect to the use of the receipt provided by said circular.

In view of the foregoing, in my opinion the questions are answered as follows:

(1) The current form of safekeeping receipt of the Federal Reserve Bank of Atlanta, issued in pursuance of the bank's operating circular No. 20, is authorized for the use of said bank by the governing authority of the bank.

(2) Since, for the reasons stated, certain doubt exists as to the power of the president, as chief executive officer of the bank, to issue

operating circular No. 20 in the form issued, caution dictates that the construction by the president of the bank of the intent and meaning of the last paragraph of said circular be accepted after such construction has been ratified and approved by the board of directors of the bank.

(See 048-61)

February 19, 1948.—048-61.

#### SAFEKEEPING RECEIPT—FEDERAL RESERVE BANK

**QUESTION:** The board of directors of the Federal Reserve Bank of Atlanta on February 13, 1948, by formal resolution ratified and approved the actions of the president of said bank in issuing, amending and interpreting all circulars of said bank then in effect. Did the action of such board as evidenced by said resolutions, remove the obstacle mentioned in an opinion to the state treasurer of December 24, 1947, No. 047-429, to the acceptance by the state treasurer of the current form of safekeeping receipt issued by said bank in pursuance of its operating circular No. 20?

*To Honorable J. Edwin Larson, State Treasurer:*

Reference is made to opinions of the attorney general numbered 047-267, 047-346 and 047-429. All of these dealt with the sufficiency of the form of safekeeping receipt issued by said bank in pursuance of its operating circular No. 20.

The aforesaid resolutions adopted by said board are quoted as follows:

"RESOLVED, That it is the function of, and within the powers delegated by the Board of Directors to, the President of this Bank to issue circulars relating to the various operations, services, and facilities of the Bank, and to interpret, withdraw, and amend the same.

"RESOLVED FURTHER, That the actions of the President in issuing, amending, and interpreting all circulars now in effect are hereby ratified and approved."

In view of the foregoing, in my opinion the obstacles to the acceptance of such safekeeping receipt by the state treasurer as set forth in aforesaid opinion No. 047-429, has been removed by the action of the board of directors of the Federal Reserve Bank of Atlanta as evidenced by the quoted resolutions, supra, and such form of receipt may be accepted by the state treasurer. It is pointed out that operating circular No. 20 is subject to the interpretation of the part thereof construed by the president of said bank as set forth in opinion No. 047-346.

May 29, 1947.—047-143.

#### CARE OF SECURITIES—LIABILITY—INSURANCE

**QUESTIONS:** 1. May the state treasurer, upon request and direction of the State Road Department of Florida, deliver for safekeeping to the Jacksonville Branch, Federal Reserve Bank of Atlanta, certain United States government securities, property of said road department, in pursuance of proper safekeeping receipt of said bank subject to the terms, provisions and conditions of operating circular No. 18 of said bank, dated January 1, 1946, relating to safekeeping, handling and shipping of securities?

2. In the event such securities are deposited for safekeeping with said bank, will it be necessary for the state treasurer to see that proper insurance coverage is carried on such securities?

*To Honorable J. Edwin Larson, State Treasurer:*

Article IV, section 24, Florida Constitution, provides that the state treasurer shall receive and keep all funds, bonds and other securities, in



such manner as may be prescribed by law, and shall disburse no funds, nor issue bonds, or other securities, except upon the order of the comptroller, countersigned by the governor, in such manner as shall be prescribed by law.

Such operating circular No. 18 of the Federal Reserve Bank of Atlanta (which includes its branches in Birmingham, Jacksonville, Nashville and New Orleans), provides, in part and in effect, that such banks will accept for safekeeping certain securities owned by member banks under the terms and conditions set forth in said circular, and further provides that such bank will accept for safekeeping, subject to the terms and conditions provided in said circular, government securities that are owned by states and municipalities.

Operating circular No. 18 sets forth in detail the terms and conditions under which it will accept such securities for safekeeping; and if it should be decided to deposit the securities mentioned in said question in the Jacksonville Branch of the Federal Reserve Bank of Atlanta, such circular should be carefully read and its terms and conditions noted. Mention is made here only with respect to the paragraph headed "Insurance on Securities Held in Safekeeping," page 4 of said circular. The following sentence is quoted therefrom:

"This bank does not agree to effect or carry any insurance on the securities of a member bank in its custody, and, therefore, any member bank which desires the protection of insurance in addition to such protection it may have under such insurance as may be carried by this bank, should, for its own protection, make arrangements directly with its own insurance companies."

In view of the foregoing, the questions, in my opinion, are answered in their numbered order as follows:

(1) The state treasurer under the foregoing constitutional provision is charged with the safekeeping of such securities and the care and diligence implicit in such trust. The law would seem to be silent on the matter of where the state treasurer shall keep such securities. It is noted, however, that the state has provided in the treasurer's office a place for the keeping of securities. There appears to be no law which prohibits the state treasurer from keeping such securities in the aforementioned branch of the Federal Reserve Bank. However, in my judgment, if securities of the state are kept by the state treasurer other than at the place provided by the state, the state treasurer assumes the risk of personal liability if a loss occurs. If such securities are placed for safekeeping in said bank, it is understood, of course, that the state treasurer shall receive proper safekeeping receipt from said bank.

(2) The quoted provision of said operating circular No. 18 would seem to answer this question; that is to say, that the bank does not engage to carry insurance on such securities and if such protection is desired beyond the limited insurance carried by said bank, the state treasurer for his own protection should make arrangements for the insurance of such securities if they are placed in said bank.

January 29, 1947.—047-16.

#### SAFEKEEPING RECEIPT—FORM—SECURITIES COVERED

**QUESTION:** Is the state treasurer authorized to accept a safekeeping receipt issued by a bank under the provisions of section 18.11, Florida Statutes, 1941, if such receipt bears a notation indicating that the securities covered thereby are not in the actual custody of the bank issuing such receipt?

*To Honorable J. Edwin Larson, State Treasurer:*

The question has arisen as the result of such a safekeeping receipt being presented to the state treasurer by a bank, which receipt has en-

dorsed on the reverse side thereof a notation which, in effect, is as follows: that the safekeeping receipt did not list the numbers or denominations of the securities described, such detailed description being omitted because said securities generally described in the face of the receipt by issue and total amount were being held in safekeeping with the New York correspondent of said bank and were grouped with other securities of similar description held for customers; that if it is preferred that a complete description of such securities be furnished, such bank would be glad to have such securities delivered to it, so that such information might be made available, "charging your account with shipping expense."

Were it not for the provisions of said section 18.11 authorizing the state treasurer to accept a safekeeping receipt under the circumstances therein set forth, the security required to be given by any bank in which state funds are deposited (see section 18.10, Florida Statutes, 1941), would have to be actually deposited with the state treasurer. Said section 18.11 authorizes the state treasurer to accept, in lieu of the actual depositing of such securities, such a receipt issued by any Federal Reserve Bank, or member bank thereof, or by any bank incorporated under the laws of the United States of America, provided such member bank or banks so incorporated under the laws of the United States shall have previously been approved and accepted by the governor, comptroller and treasurer. The form of the safekeeping receipt set forth in the statute, among other things provides, in effect, that the bank issuing the same holds for safekeeping the securities deposited with it and specifically described in such receipt.

In view of the foregoing, in my opinion the question is properly answered as follows:

It would seem to be the intent and purpose of the provisions of said section 18.11, Florida Statutes, 1941, and the form of safekeeping receipt therein set forth, that a bank issuing such a receipt should have in its actual possession the securities described in said receipt. Hence, the question is answered in the negative.

July 1, 1948.—048-223.

#### SECURITIES COMMISSION EMPLOYEES—BOND—TREASURER EMPLOYEES

QUESTIONS: 1. Is the Florida Securities Commission required by statute to place its employees under bond?

2. Bond No. 1327272 of United States Guarantee Company defines employees of the Securities Commission as employees of the state treasurer. Are the employees of said commission fully covered under the terms and conditions of this bond?

3. Does the clause in this bond defining employees "... and working under the direction and supervision of the assured" so qualify the definition of employees as to render such coverage voidable in view of the fact that the state treasurer is only one member of the three-man commission?

*To Honorable J. Edwin Larson, State Treasurer:*

The Florida Securities Commission was created by chapter 517, Florida Statutes, 1941. Provision is made in said chapter for the employment by the Securities Commission from time to time of such clerks and employees as are necessary for the administration of the securities act. Such act contains no provision requiring the commission to place its employees under bond. Question No. 1 is therefore answered in the negative.

I have examined bond No. 1327272 of United States Guarantee Company wherein J. Edwin Larson, state treasurer of the State of Florida, Tallahassee, Florida, is named the assured. Section 3 thereof defines "employees" to mean any employees in the treasury department, insurance

department, warrant department or Securities Commission of the State of Florida and working under the direction and supervision of the assured.

At the meeting of the Securities Commission held on Wednesday, June 30, 1948, you were designated as the official custodian of the securities and funds held by the commission. Ordinarily, the employees of the Securities Commission could not be classified as the employees of yourself as state treasurer. Nevertheless, since the commission has designated you as its official custodian, bond No. 1327272 clearly binds the insurance company to pay and make good to you any direct losses which you are insured against under such bond and any losses coming within the purview of such bond to you as custodian for the Securities Commission would be covered thereby. Question No. 2 is, therefore, answered in the affirmative.

Since you have been appointed official custodian by the Securities Commission, question No. 3 is answered in the negative.

September 22, 1948.—048-309.

#### BONDS AND COUPONS—CANCELLATION AND DISPOSITION

**QUESTION:** A resolution of the Board of County Commissioners of Indian River County, Florida, identifying certain bonds and interest coupons heretofore received by the state treasurer from the tax officials of Indian River county and held by him as custodian thereof, as provided in chapter 16482, Laws of Florida, acts of 1933, requests and directs the state treasurer to cancel such obligations and to make disposition of them in the manner set forth in such resolution and as outlined below. In the light of the provisions of said chapter 16482, Laws of Florida, acts of 1933, and chapter 23345, Laws of Florida, acts of 1945, should the state treasurer comply with the requests and directions set forth in such resolution?

*To Honorable J. Edwin Larson, State Treasurer:*

This subject was dealt with in opinion No. 046-229, A. G. R. 1945-1946, page 98. Reference is made to such former opinion and the advice therein contained.

The resolution of the aforementioned Board of County Commissioners briefly recited the following: identified certain bonds, interest coupons, etc., of Indian River county and taxing districts within said county received in the redemption and payment of taxes "pursuant to chapter 16482 of the Laws of Florida, acts of 1933, or chapter 17401, Laws of Florida, acts of 1935;" authorized the clerk of the court of said county to cancel the same by that official causing the same to be cancelled by the state treasurer; that upon cancellation and under the circumstances set forth in the resolution, the treasurer is directed to deliver such cancelled obligations to the State Board of Administration, except that the Sebastian Inlet District obligations shall be delivered to the treasurer of said district, and the St. Lucie County Special Tax School District bonds and coupons shall be delivered to the superintendent of public instruction of Indian River county; that as a condition to the cancellation of St. Lucie County Public Highway bonds and coupons, the treasurer shall arrange and determine that due credit is or has been received for the same by Indian River county for its indebtedness to St. Lucie county, "and in his capacity as County Treasurer of Indian River County, Florida, ex officio and as escrow agent under and by virtue of Resolution adopted January 21st, 1938, by the Board of County Commissioners of Indian River County, and providing for settlement of indebtedness between Indian River County and St. Lucie County and for the crediting of all parts of such indebtedness then or thereafter paid by Indian River County," and to certify that Indian River county has received credit for such obligations against its indebtedness to St. Lucie county.

In view of the provisions of said chapters 16482 and 17401, and the fact that we are here concerned with such obligations delivered to and

held by the treasurer as custodian, ordinary caution dictates that we assume the position that all such obligations were received pursuant to chapter 16482, and delivered to the state treasurer charged with the trust of that official's seeing that due accounting thereof be had and made, as set forth in our opinion 046-229. There appears to be nothing in chapter 23345, changing the trust duty of the treasurer imposed by chapter 16482, nor is there any apparent antagonism between such laws.

The resolution contains the following recitation: "Whereas, it has been determined by this Board that the securities held by the State Treasurer and described upon Exhibit 1 hereto attached were accepted solely in redemption or payment of taxes imposed for application to such securities so accepted or that there has been an adjustment of accounts by the several taxing units interested in said securities and with the result, so far as may be determined by the public records and made known to this Board, that each unit interested in said securities has received the same tax benefits as though said securities has been paid and the proceeds thereof distributed in the proportion that each of said units had an interest therein, as fixed by section 3 of said chapter 16482."

In view of the foregoing, in my opinion the question is answered as follows:

(1) I re-assert the advice set forth in my previous opinion No. 046-229. The sole apparent authority of law for the cancellation of the securities and obligations here involved seems to be that set forth in said chapter 23345 which, under the circumstances therein provided, grants such authority to the clerk of the Circuit Court of Indian River County. Hence, there would seem to be no authority of law for the state treasurer, as such to cancel such securities.

(2) It is suggested that the state treasurer may deliver such securities for cancellation under the following circumstances:

(a) Upon receipt of a certificate of the clerk of the Circuit Court of Indian River County, setting forth by name the taxing units in said county whose taxes were paid or redeemed by all or any of such securities or coupons, as evidenced by the records of said county; and

(b) Upon receipt of a certified copy of resolution duly adopted by the governing authority of each of such taxing units whose taxes were redeemed or paid with any of such securities or interest coupons, evidencing that such governing bodies have determined, without qualification, that their respective tax units have received full credit for the tax-interest of such respective units in said securities, as contemplated by section 3 of said chapter 16482, by virtue of the fact that such securities or interest coupons were accepted solely in redemption or payment of taxes imposed for application to such respective securities and interest coupons so accepted, or, in the event taxes other than those imposed to pay any of such respective securities or coupons were paid or redeemed by them, or any of them, by virtue of the fact that as result of an adjustment of accounts between such units interested in said securities, their respective taxing units have received full credit for the tax interest of such units in said securities.

(c) Should request be made upon the state treasurer by said clerk for delivery to the latter of such securities and interest coupons for cancellation, accompanied by the certificate and certified copies of resolutions set forth as required, delivery of such road and bridge bonds, among such securities, should be only after approval of the State Board of Administration. It is further noted that the state treasurer may ascertain from said board whether or not, with respect to the St. Lucie County Public Highway bonds and coupons, Indian River county has received credit therefore against its indebtedness to St. Lucie county.



## CHAPTER IV

### JUDICIARY DEPARTMENT

#### CIRCUIT COURTS, CIRCUITS, JUDGES

April 5, 1947.—047-95.

##### SALARIES—FUNDS FOR PAYMENT

**QUESTION:** The 1945 Legislature authorized additional circuit judges but failed to appropriate a sufficient amount in the General Appropriation Act to provide for the salaries of such judges. Where there will be a deficit of approximately \$56,000 as to such salaries for the fiscal year ending on June 30, 1947, can the appropriation in said act for salaries of circuit judges be exceeded to the extent necessary to pay the salaries of such additional judges?

*To Honorable C. M. Gay, State Comptroller:*

Under facts quite similar to those reflected by the foregoing question, the Supreme Court of Florida held that the salaries of circuit judges could be paid out of any available funds in the state treasury in the general state funds (see *In re Advisory Opinion to the Governor*, 154 So. 154 and *State ex rel. Williams v. Lee*, 191 So. 697). It is my opinion, therefore, that the question is properly answered in the affirmative and that the salaries under discussion can be paid from the general revenue fund of the state.

September 9, 1948.—048-288.

##### OFFICE EXPENSES—CIRCUIT JUDGES

**QUESTIONS:** 1. Is it the duty of the Board of County Commissioners or of the State of Florida, or either, to furnish stationery, office supplies, typewriters and service thereon, and furniture, for maintaining the circuit judge's office in the county seat or other place in the county?

2. Does the state or the Board of County Commissioners, or either, have authority to rent office space outside the county seat of Polk county for the circuit judge to use when sitting in chambers; if so, by what agency is the rental payable?

*To Honorable D. H. Sloan, Jr., Clerk and Auditor, Board of County Commissioners, Bartow, Florida:*

In answer to the first question, I assume the county has no local or special act on this subject.

Section 26.50, Florida Statutes, 1941, reads as follows:

"The judge of the circuit court, at each term thereof, shall make a written requisition upon the sheriff attending upon said court for such stationery or other articles as he may deem necessary for the use of the court, and the sheriff shall procure the same, and in no other way shall the sheriff or other office of the court be authorized to purchase articles at the expense of the state; the said requisition shall be a sufficient voucher to sustain the claim of any person furnishing articles as aforesaid against the state."

It is my opinion that an interpretation of this statute must lead to the conclusion that the stationery, or other articles mentioned therein, apply only to such stationery and articles as shall be used by the court for

the sessions thereof, and is not broad enough to include stationery or articles that may be necessary for the judges in conducting their offices when sitting in chambers.

Section 43.03, Florida Statutes, 1941, as amended, reads as follows:

"The judges of all constitutional courts of record and the judge of the court of record of Escambia county, Florida, shall be entitled to authorize and expend a sum not to exceed three hundred dollars per year for office furniture, furnishings, supplies, equipment and expenses of the office of such judges.

It is the intention of this law that all expenses of the offices of judges of all constitutional courts of record of the State of Florida and of the court of record of Escambia county, Florida, are to be paid by the county and nothing herein contained shall limit the power of any county, through its proper officers, to expend any amount it sees fit, over and above the said sum of three hundred dollars, for office expenses of and in connection with the operation of the offices of such judges."

Reference is made to two different opinions previously released by this office dealing with this statute. One dated July 12, 1944, No. 044-199, published in the Attorney General's Biennial Report for 1943-1944, and the other dated June 30, 1947, No. 047-194, not yet reported.

It will be noted that these opinions refer to the interpretation of this section insofar as it affects county courts and county judges. My suggestions for judicial interpretation of this section were acted upon in DeSoto County in a suit for a declaratory decree brought by the county judge against the county commissioners and the court held that the statute did not cover a county court. This case was not appealed to the supreme court and I do not have an opinion from that court for guidance.

It is my opinion that, in the absence of a court decree holding otherwise, a circuit court should be considered a constitutional court of record so as to come within the application of said section 43.03, Florida Statutes, 1941, as amended.

In answer to the second question, in the absence of a special or local statute—and I am not advised that Polk county has one—I know of no law authorizing, or any valid appropriation for the rental of office space outside of the county seat for the use of circuit judges sitting in chambers.

### CLERKS OF CIRCUIT COURT

September 25, 1947.—047-327.

#### JUVENILE OFFENDERS—REPORTING BY CLERK—CONVICTIONS

QUESTION: Do the requirements of section 28.27, Florida Statutes, 1941, apply to delinquent children whose cases have been adjudicated by the juvenile court of Polk County?

To Honorable G. Bowdon Hunt, Judge of Juvenile Court, Bartow, Florida:

Section 28.27, Florida Statutes, 1941, reads as follows:

"The clerks of all other courts in the county, having criminal jurisdiction, or the county judge or justice of the peace, shall certify to the clerk of the circuit court the name of all persons convicted of crimes in their respective courts, with a statement of the crime for which conviction was had, within twenty days after the date of conviction."

Section 415.22, Florida Statutes, 1941, reads as follows:

"An adjudication in the case of any delinquent child as defined by section 415.01, by a juvenile court judge, or the county judge



sitting as a juvenile court, shall not be considered a conviction by the said judge or court; and said delinquent child shall not be considered as a criminal as a result of such adjudication, nor shall such adjudication operate to impose upon said delinquent child any of the civil disabilities ordinarily imposed by conviction."

Reading these two sections together, it is my opinion that the requirements of section 28.27 do not apply to such adjudications, in the Juvenile Court of Polk County, as such adjudications are not convictions as contemplated by said section 28.27.

July 10, 1947.—047-192.

#### SALE OF LANDS—FEES—SOURCE

QUESTION: Does the clerk under chapter 23830, Laws of Florida, 1947, get the customary clerk's fees pursuant to chapter 22079, acts of the Legislature, 1943, or will the clerk's fees be based upon an amount realized from the sale of said property pursuant to chapter 23830?

*To Honorable Jess Mathas, Clerk of Circuit Court, Volusia County, DeLand, Florida:*

Section 4 of said chapter 23830 provides as follows:

"The said clerk of said court shall report to the board of county commissioners and obtain deeds of conveyance to the highest bidder or bidders for the several parcels of land offered for sale and sold, and the said clerk shall receive for his services in connection with the holding of any such sale or sales the same fee which he would have received had said sale been held and conducted in pursuance of an offer or bid made under the provisions of said chapter 22079."

In my opinion, no other construction can be given this section except that the clerk under sales made pursuant to chapter 23830 shall receive for his services thereunder the same fee he would have realized had the said sale been held under the provisions of chapter 22079.

I realize that in many instances where the price of the lot under chapter 23830 is small and the clerk's costs comparatively large, a great many sales will fail because of this, but I must take the law as I find it.

July 12, 1947.—047-203.

#### RECORDING INSTRUMENTS—FEES—COLLECTIONS

QUESTION: On several occasions attorneys have presented satisfaction of mortgages and have directed the clerk of the circuit court to record same and to collect the fee for recording from certain Florida corporations, which corporations were acting as servicing agents for the mortgages which had been satisfied. Upon request by the clerk, such servicing agents refused to pay the bill for recording. Is there any responsibility on the part of these Florida servicing corporations or companies to pay the clerk's fee for such recording?

*To Honorable George G. Crawford, Clerk of Circuit Court, Leon County, Florida:*

I do not think it is the duty of the clerk of circuit court to act as a collecting agency. When satisfactions are presented, the clerk has a perfect right to refuse to record same until the fee for recording is paid. It is not the duty of the clerk to determine who is responsible for the payment of recording fee, but the clerk certainly has the authority to refuse to record the satisfaction until the fee is paid by some one.

January 23, 1947.—047-19.

#### COMPENSATION—ALLOWANCE BY COUNTY

**QUESTION:** The office of clerk of the circuit court in Glades county does not earn in one year, net, \$5,000.00. Is it legal for the Board of County Commissioners to guarantee to such clerk a fixed amount as compensation for services as clerk for such office?

*To Mrs. D. S. Weeks, Clerk of the Circuit Court, Glades County, Moore Haven, Florida:*

I assume that there is no special law applicable to Glades county.

I know of no law which would give the county commissioners authority to guarantee any amount to you for services as clerk of the circuit court. I do not mean to say by this opinion that the Board of County Commissioners may not fix a compensation to you as clerk of the said Board of County Commissioners, for under section 28.25, Florida Statutes, 1941, the commissioners have a right to fix compensation for the clerk of their board and upon a basis proportionate to compensation allowed by law for other services; provided, of course, that the same is included in their budget.

#### STATE ATTORNEY

July 21, 1948.—048-238.

#### EXPENSES—CRIMINAL INVESTIGATORS—RECORDING MACHINE PURCHASE

**QUESTIONS:** 1. Recently the state attorney of the second judicial circuit found it necessary to seek the assistance of criminal investigators on cases outside the city of Tallahassee. These investigators were employees of the city of Tallahassee and their salaries were paid by the said city. Are the expenses of these investigators for subsistence, traveling expenses, etc., a legitimate expense of the state attorney's office to be borne by the state?

2. The state attorney of the second judicial circuit finds it economical to use a recording machine instead of a court reporter. The cost of such machine is approximately \$150.00. Does the state attorney have authority to purchase such a machine as a legitimate expense of his office to be borne by the state?

*To Honorable C. M. Gay, State Comptroller:*

In answer to the first question: It is my opinion that, if the state attorney, because of an emergency, found it necessary to use the services of these city officers in these particular instances in the due enforcement of law, he should be reimbursed for the expenses of these investigators. I feel that such expense could be classed as "necessary and regular." (State vs. Lee, 151 So. 491.)

However, I call attention to the fact that the sheriff of the county is ordinarily charged with the duty of investigating such cases and receives special compensation therefor. See section 30.23, Florida Statutes, 1941, as amended, which reads as follows:

"Investigation of crime when made under the direction of the judge of any court having criminal jurisdiction, or of the state's attorney, county solicitor or other prosecuting officer, per day for sheriff or per day per deputy (to be approved by the court) . . . 6.00"

In answer to the second question: I know of no authority which would allow the purchase of such a machine at the expense of the state, although I am sure the purchase of same is desirable.

## COURT REPORTERS

June 30, 1947.—047-194.

## COURTS OF RECORD—PAY OF REPORTER

QUESTIONS: 1. Does chapter 23768, Laws of Florida, 1947, apply to county judge's courts?

2. Does chapter 23768, Laws of Florida, 1947, apply to county courts?

*To Honorable James C. Gwynn, County Judge, Leon County, Tallahassee:*

Chapter 23768, Laws of Florida, 1947, amending section 1 of chapter 11977, Laws of Florida, 1927, the same being section 29.01, Florida Statutes Annotated, provides for the appointment of a reporter of testimony in all constitutional courts of record in the State of Florida. Both county courts and county judge's courts are provided for in the Constitution of Florida, article V, sections 17 and 18. Section 38.02, Florida Statutes, 1941, also provides that "county judge's courts shall be courts of record . . ."

Chapter 23768, Laws of Florida, 1947, which is an act amending sections 1, 2, 3, 4, and 5 of chapter 11977, Laws of Florida, 1927, provides in part "that there shall be a reporter of testimony and proceedings in trials at law in all constitutional courts of record in the State of Florida, including without limitation the court of record of Escambia county, Florida."

The answers to the questions will depend entirely upon what is meant by constitutional courts of record in the State of Florida.

A similar question was presented to me wherein I was asked to construe chapter 21681, Laws of Florida, 1943 (section 43.03, Florida Statutes, 1941, volume I, 1943 Supplement), and in opinion No. 044-199 dated July 12, 1944, I said:

"Question: Does chapter 21681, Laws of Florida, Acts of 1943 (section 43.03, Florida Statutes, 1941, volume I, 1943 Supplement) require the board of county commissioners of DeSoto county to expend \$300.00 per year for equipment and expenses for the office of the county judge?

"The words 'all constitutional courts of record' in chapter 21681 appear to me to be ambiguous and of uncertain meaning. Moreover, there are other statutes containing similar language which affect the rights and status of several officials besides the county judge of your county. Therefore, I feel that it would be more appropriate that a bill for a declaratory judgment under chapter 21820, Laws of Florida, acts of 1943, (sections 87.01 to 87.13, inclusive, Florida Statutes 1941, volume I Supplement) be filed for the purpose of securing a judicial interpretation of this language rather than for me to attempt to pass upon the question in an unofficial opinion as requested.

"I will be glad to bring the suit in question on request of an official whose interest is such that he would be proper party plaintiff, or to assist in any other manner to facilitate the obtaining of an early interpretation of the statute by declaratory judgment.

"As I view it, the question is whether the term, 'constitutional courts of record,' refers to (1) courts of record in the common law sense, see 14 Am. Jur., pages 250 and 251) or (2) civil and criminal courts of record *eo nomine* specially created by the State Constitution or by the Legislature.

"In the common law sense we know that the supreme court, circuit courts, civil and criminal courts of record, county courts and county judge's courts are courts of record, whereas justice of the peace courts and municipal courts are not, yet all of these courts are referred to in the constitution save civil courts of record.

"We know too, that by Constitutional amendment the Escambia county court of record was created and that pursuant to the authority of the constitution the legislature has by statute created special criminal and civil courts of record in certain counties.

"Therefore, the question as I see it is whether the term 'constitutional courts of record,' refers to courts of record under the common law definition of such courts, or to courts of record eo nomine established specially by the State Constitution or by the Legislature."

I have been unable to find where our supreme court has passed upon the question as to what are "Constitutional Courts of Record." I, therefore, do not feel that I should pass upon the two questions. The questions should be left to our courts to determine.

July 27, 1948.—048-255.

#### SALARY—COURT REPORTER—JUDGE'S SECRETARY

QUESTION: Is it proper for the county of Bay, by and through its county commissioners, to pay the entire salary of one of the official court reporters acting as secretary to the circuit judge residing in Bay county, to the exclusion of a contribution to the payment of such salary from the other counties of the circuit?

*To Honorable W. S. Weaver, Ex Officio Secretary of the Board of County Commissioners, Bay County, Panama City, Florida:*

Chapter 23768, Laws of Florida, 1947, section 5, provides for additional duties and compensation of the official court reporter referred to in said act. Section 5 provides that the court reporter shall act as secretary to the judge of the circuit court and for such services shall be paid a salary of \$1800.00 per annum, payable in twelve monthly instalments from the general fund of the county wherein such court reporter is required to perform his duties.

The 14th Judicial Circuit of Florida is a six (6) county circuit composed of the counties of Holmes, Washington, Jackson, Calhoun, Bay and Gulf, and the circuit courts thereof are presided over by two circuit judges, Honorable E. C. Welch and Honorable Ira A. Hutchison.

As noted from the provisions of chapter 23768, the said salary of the said court reporter when acting as the judge's secretary shall be paid "from the general fund of the county wherein such court reporter is required to perform his duties." As to the county wherein such court reporter is required to perform his duties, that will be determined by the facts in the case. If the entire duties of the said court reporter when acting as such secretary are performed in Bay county, then Bay county should pay the same from its general fund. If, on the other hand, the said court reporter when acting as such secretary is required to perform his duties in more than one county, then those counties wherein he does perform his duties should pay the said salary.

This raises a question of fact which must be determined by the county commissioners of the several counties affected and the judge for whom the said court reporter acts as such secretary.

#### COUNTY COURTS

May 22, 1947.—047-138.

#### COUNTY JUDGE—QUALIFICATIONS

QUESTION: Is one who is not a lawyer qualified to serve as county judge of a county in this state in which there has been created a county court?



*To Honorable Millard F. Caldwell, Governor:*

There appears to be no constitutional or statutory requirement that the county judge of a county in which there is a county court must be a lawyer (see article V, sections 3 and 18, Florida Constitution; chapter 21363, Laws of Florida, acts of 1941; chapter 34, Florida Statutes, 1941).

Hence, the question is answered in the affirmative.

August 9, 1947.—047-248.

#### COUNTY JUDGE—SALARY—CONTROLLING LAW

QUESTIONS: 1. Should the county judge of Seminole county be paid under section 6, chapter 9344, Laws of Florida, 1923, or under section 34.21, Florida Statutes, 1941?

2. If the judge of the county court is entitled to the salary of \$1200.00 as provided in section 34.21, Florida Statutes, 1941, is he entitled to any other fees for his services?

*To Honorable Lloyd F. Boyle, Attorney for the Board of County Commissioners, Seminole County, Sanford, Florida:*

These questions are very close questions and, frankly, there is argument on both sides.

Chapter 9344 is a special law, applicable only to Seminole county, and it created, organized and established a county court in that county. Section 6 thereof reads as follows:

"That the county judge of Seminole county, Florida, shall be the judge of said county court and shall receive a salary of five hundred dollars per annum to be paid quarterly by the board of county commissioners and shall also receive a fee of three dollars for each case docketed in said court to be taxed and paid as costs therein."

Section 34.21, Florida Statutes, 1941, reads as follows:

"In each county where the population exceeds twenty-two thousand people, the judge of the county court shall receive an annual salary of twelve hundred dollars payable quarterly by the county treasurer. This compensation shall exclude all salary, fees, or other compensation which the said judge of the county court as such might receive or be entitled to, under or by virtue of any other laws, but it shall not exclude or affect any salary, fees, or other compensation which the county judge, as such, may receive, or be entitled to."

This section 34.21, as far as can be ascertained, appeared first in the General Statutes of 1906 as chapter 2044. At that time it applied to counties where the population exceeded twenty-three thousand people, and the salary of the judge was less than it is now. This chapter 2044, General Statutes of 1906, was amended by chapter 7333, section 1, Laws of 1917, and the population by this amendment was reduced to the present number of twenty-two thousand people.

There must have been a reason for reducing the population requirements by this amendment, and the only reason which I can advance is that the Legislature intended to bring in some counties which had county courts within the purview of this law.

It, therefore, develops that when chapter 9344 was passed in 1923 that section 34.21 was then in force and effect. Recently Seminole county's population has increased with a result that it now has a population exceeding twenty-two thousand people. I am not unmindful of the rule that where a general law is in force and a special law is enacted, the special law

will control. However, judging from the history of this section 34.21, it seems that it forms one of the exceptions to the foregoing rule, and the general law was intended to control in all counties where the population exceeded twenty-two thousand people.

In view of this, I think the judge of the county court of Seminole county is entitled to a salary of twelve hundred dollars per annum. This will exclude all other salary, fees or other compensation which the county judge as judge of the county court might receive or to which he may be entitled. It does not exclude the fees, however, to which he is entitled as county judge; provided, both his compensation as judge of the county court and as county judge, does not exceed the statutory amount of seventy-five hundred dollars.

### COUNTY JUDGES' COURTS

April 21, 1947.—047-109.

#### ISSUANCE OF MARRIAGE LICENSE—CLERK

QUESTION: Is it legal for the authorized clerk of the county judge's court to issue a marriage license in the absence of the county judge, as an example: John Smith by Mary Smith, Clerk?

*To Honorable John T. Rose, Jr., County Judge, Charlotte County, Punta Gorda, Florida:*

Chapter 22559, Laws of 1945, which authorizes the county judge to appoint a clerk of his court, states that such clerk may exercise "all non-judicial functions which the judge may perform."

Recently I rendered an opinion in which I stated that inasmuch as such a clerk performed non-judicial functions it would be possible for the county judge to appoint a minor to serve as such clerk.

Chapter 22643, Laws of Florida, 1945, which deals with the matter of the issuance of marriage licenses, sets forth the duties required of the county judge: that there must be filed with him certain affidavits, which, he must judge as to the legal sufficiency before issuing the marriage license.

Chapter 22738, Laws of Florida, 1945, sets forth another condition required of the county judge which is a condition precedent to the issuance of marriage licenses, to wit: a certificate from a licensed physician together with a serological test for the discovery of a venereal disease. The legal sufficiency of these must be passed upon by the county judge before issuing the marriage license. There is further embraced in the said law that if the female is pregnant, even though infected with syphilis, and the county judge is satisfied by affidavit, or other proof, that she is so pregnant, he can issue the marriage license.

All of these requirements seem to me to be so judicial in character that they would require the decision of the county judge himself and could not be decided by his clerk.

I, therefore, answer the question in the negative.

June 30, 1947.—047-178.

#### CRIMINAL FILE—DISPOSITION—CLERK

QUESTIONS: 1. In a county, such as Leon, where there are only two courts—county judge's court and circuit court—and the county judge, acting as committing magistrate, certifies a felony case to the circuit court for trial, should the original county judge's criminal file, containing the affidavit, warrant, subpoena, etc., be returned to the county judge after information or indictment is filed in the circuit court, or should they be retained by the clerk of the circuit court?



2. In the event that no indictment or information is filed after the case is certified to the circuit court, should the original county judge's criminal records be returned to the county judge's office? If not, where should they be filed?

*To Honorable James G. Gwynn, County Judge, Leon County, Tallahassee:*

Section 902.18, Florida Statutes, 1941, says:

"(1) When the magistrate has discharged the defendant, or has held him to answer, he shall transmit without delay to the clerk of the court having jurisdiction of the offense:

"(a) The warrant;

"(b) The depositions of the witnesses;

"(c) The defendant's deposition, if he testified;

"(d) The recognizance or undertaking for the appearance of witnesses;

"(e) A copy of the order discharging or holding the defendant;

"(f) Every article, writing, money, or other exhibit used in evidence; provided, however, that such articles, writings, moneys, or other exhibits so used in evidence before said magistrate may be returned to the owner thereof upon written order of the judge of the court having jurisdiction to try the defendant.

"(2) Any magistrate who refuses or fails to transmit the papers so mentioned, may be ordered to do so by the court having jurisdiction, and in case he disobeys such orders may be held for contempt."

In my opinion, it was the intention of the Legislature in enacting this section that these papers be retained by the clerk of the court, having jurisdiction of the offense, in his permanent records, and that the committing magistrate no longer have the custody or control of same; therefore, in my opinion, the papers should be retained by the clerk of the court having jurisdiction of the offense among his permanent files in either of the events mentioned in the question.

As a practical matter I would suggest that immediately upon receipt of a set of papers so sent in by the committing magistrate that the clerk make a permanent file of same. Thereafter if an information is filed, or indictment found, these papers could be transferred to the clerk's file wherein he usually keeps informations and indictments. If no information is filed, or indictment found, the clerk should still keep the papers among his files as a permanent record for the inspection of the public. -

### CRIMINAL COURT OF RECORD

March 3, 1947.—047-62.

#### COUNTY SOLICITOR—ABSENCE FROM OFFICE

QUESTION: What requirements must be met in order for a county solicitor to be absent from the state?

*To Honorable Luther W. Cobbey, County Solicitor, Hillsborough County, Tampa, Florida:*

Section 32.17, Florida Statutes, 1941, provides that in the absence of the county solicitor, the judge of the criminal court of record will appoint an acting county solicitor. This section also provides that this appointment be made a matter of record by an entry in the minutes of the court.

I do not find it necessary that you make a report to the governor's office, nor is it necessary to report to my office that you plan to be absent from the state.

March 27, 1947.—047-84.

#### DISPOSITION OF EVIDENCE—WEAPONS—GAMBLING EQUIPMENT

**QUESTION:** In what manner may a clerk of a criminal court of record dispose of money and/or articles, which have been filed with him as state's evidence in cases wherein the defendant has been convicted?

*To Honorable Chas. E. Limpus, Clerk, Criminal Court of Record, Orange County, Orlando, Florida:*

The question does not tell me what articles or what money the clerk has, nor in what cases they were filed in evidence, and in order to cover all of such articles or money, I would have to have this detailed information.

I call attention to the following statutes which I hope will be sufficient for the purpose indicated.

Section 790.08, Florida Statutes, 1941, as amended by chapter 22049, paragraph 1, Laws of 1943, provides for the disposition to be made of weapons taken from persons engaged in criminal offense, which weapons are defined in section 790.07, Florida Statutes, 1941.

As to the disposition of gambling apparatus and the money found in the mechanisms of gambling devices which have been forfeited, reference is made to section 901.19, Florida Statutes, 1941.

As to the disposition of "evidence money" reference is made to section 116.21, Florida Statutes, 1941, being chapter 22050, Laws of 1943, paragraphs 1-14.

#### JUDGES

June 19, 1948.—048-203.

#### CIRCUIT JUDGES' RETIREMENT—WITHDRAWAL FROM FUND— REFUND OF CONTRIBUTIONS

**QUESTIONS:** May a circuit judge, who has been defeated as the democratic nominee and who has not served on the circuit bench for twelve years and who at the beginning of his service as circuit judge elected to take advantage of the law relative to the retirement of circuit judges:

1. Stop deductions from his salary under said law and withdraw from the provisions thereof, and
2. Receive a refund of amounts paid into said fund?

*To Honorable C. M. Gay, State Comptroller:*

Statutory provisions for the retirement of circuit judges appears in sections 38.14-38.19, Florida Statutes, 1941. Section 38.17 provides for the giving of notice by a circuit judge to the state comptroller and state treasurer of his election to take the benefits of the retirement statutes and for the deduction of two percent from each instalment of the salary of the circuit judge electing to take the benefits of the act so long as such judge shall hold office. The deductions are deposited in a Circuit Judges' Retirement Fund.

I think it is not necessary to give a strictly literal interpretation to the words, "so long as such circuit judge shall hold office." The circuit judge has the privilege of accepting the benefits of the act or not, as he may see fit. In view of the fact that acceptance of the benefits of the statutes

is optional, it is my opinion that continued participation is also optional, and that the circuit judge may change his mind and withdraw from the plan, stopping his contributions to the fund whenever he sees fit to do so.

It is also my opinion that a circuit judge would have the right to withdraw his contributions on withdrawing from the plan except for the fact that there is no appropriation of funds for such purpose and no authority therefor in the comptroller to make refund until the Legislature makes an appropriation.

### COUNTY JUDGE

October 9, 1947.—047-317.

#### PEACE BONDS—POWER TO BIND OVER—CONSERVATORS OF PEACE

**QUESTION:** Do the county judges of the several counties of this state have authority to bind over persons under bond to keep the peace?

*To Honorable Millard F. Caldwell, Governor:*

All judicial officers of this state are conservators of the peace. (Article V, section 36, Florida Constitution.) County judges are committing magistrates. (Article V, section 17, Florida Constitution.)

Section 901.01, Florida Statutes, 1941, provides, as in our constitution, that judicial officers of the state are conservators of the peace, and further, among other things, that they are committing magistrates, and that they may require "sureties of the peace when the same has been violated or threatened."

This designated function of those public officers designated as conservators of the peace and committing magistrates in this state would seem to be in harmony with the rule which prevailed at common law with respect to such officials.

Specifically, section 37.21, Florida Statutes, 1941, grants to justices of the peace, under the circumstances and subject to the conditions and limitations there found, authority to bind over persons under bond to keep the peace, or to commit them upon failure to furnish such bond. While it is reasonably arguable that no provision of our constitution or statutes grants to county judges power to function under said section 37.21, for the reasons apparent in the answer below, the point is not further discussed here.

In view of the foregoing, in my opinion the question is properly answered as follows:

County judges in the several counties of this state are authorized to require "sureties of the peace when the same has been violated or threatened;" hence, the question is answered in the affirmative. In the absence of limitations or conditions in section 901.01 in connection with the exercise of such power, county judges may follow safely the conditions and limitations in the execution of such power found in said section 37.21.

January 3, 1948.—048-1.

#### PAY OF COUNTY JUDGE—ORIGINS OF JUDGE'S PAY.

**QUESTIONS:** 1. If the judge of the county court is to receive the salary of \$1200.00, under section 34.21, exclusive of all other fees, when does that method of payment begin—upon the ruling of the attorney general, declaring this method of payment, or on January 1, 1937, when the present judge took office?

2. If, as stated by the Board of County Commissioners of Seminole county, this salary of \$1200.00 began as of January 1, 1937, then in that event what disposition is to be made of the sum of money over this period

that has been collected as costs from the defendants who have been sentenced during that period?

*To Honorable R. W. Ware, County Judge, Seminole County, Sanford, Florida:*

In an opinion rendered by me concerning the salary of the county judge of Seminole county, under date of August 9, 1947, I held that section 34.21, Florida Statutes, 1941, controlled as to the amount of the annual salary of the judge of the county court, of Seminole county if the population of Seminole county had exceeded 22,000 people; but that said section did not affect any salary, fees or other compensation which the county judge, as such, may receive or be entitled to, provided, however, his compensation as judge of the county court and as county judge did not exceed the statutory amount of \$7500.00.

In that opinion I did not determine the effective date of the said section as applicable to Seminole county.

If I understand the situation in Seminole county, up until I rendered this opinion, the county commissioners, county judge and all parties concerned were under the impression that chapter 9344, which was a special law applicable only to Seminole county, determined the compensation of the judge of the county court.

Said chapter 9344 gave the county judge of Seminole county, Florida, as judge of the county court a salary of \$500.00 per year to be paid quarterly by the Board of County Commissioners, and the judge of the said county court also received a fee of \$3.00 for each case docketed in said court.

Inasmuch as all parties concerned, including the county commissioners and the county judge, were under the impression that chapter 9344 was applicable until the opinion was rendered by me on August 9, 1947, and it had not been determined by the county commissioners, or any one else, that the population of Seminole county had increased to where section 34.21, Florida Statutes, 1941, was applicable, it is my opinion that the salary of the judge of the county court of Seminole county should be computed under said section 34.21 from the date I rendered my opinion holding that the salary should be computed under section 34.21.

## JURORS AND JURY LISTS

January 13, 1948.—048-9.

### QUALIFICATIONS FOR JURORS—REGISTERED VOTER

**QUESTION:** Does a male person over the age of twenty-one years who is a resident of the State of Florida for one year and his respective county for six months, have to be a registered voter before he can serve as a grand or petit juror?

*To Honorable George G. Crawford, Clerk of Circuit Court, Leon County, Tallahassee, Florida:*

Section 40.01, Florida Statutes, 1941, follows the constitution, and says:

"Grand and petit jurors shall be taken from the male persons over the age of twenty-one years, who are citizens of this state, and who have resided in this state for one year and in their respective counties for six months."

The foregoing provision of the statutes was enacted in 1893, chapter 4122. Previous to this date registration as a voter was required as a qualification for service as a grand or petit juror, but such qualification is not now required.

I therefore answer the question in the negative.



December 31, 1947.—047-440.

#### COMPENSATION OF JURORS—JURORS FOR INQUESTS

QUESTION: What is the compensation of jurors for inquests of the dead, when the county judge, in the absence of a justice of the peace, summons them?

*To Honorable R. M. Witherspoon, County Judge, Franklin County, Apalachicola, Florida:*

Section 936.18, Florida Statutes, 1941, says:

"Jurors . . . at inquests shall be paid the same per diem and mileage as jurors and witnesses in the justice of the peace courts."

Section 40.24, Florida Statutes, 1941, says:

" . . . Jurors in the courts of county judges and justice of the peace and jurors summoned upon inquest of the dead shall be paid one dollar per day for each day they serve on the jury."

I feel sure the quoted sections of the statutes will answer the question.

#### JUSTICES OF THE PEACE

December 6, 1947.—047-403.

#### CONSTABLE JURISDICTION—RETURN OF PRISONERS

QUESTION: If a crime is committed in the justice of the peace district of one county, and a warrant is issued, by the justice of the peace for the arrest of the accused, and the accused is arrested in another county, is the constable for the justice of the peace district in which the crime was committed authorized to go into the other county and return the accused to the county jail of the county in which the crime was committed?

*To Honorable Dave Hudson, Constable, Chiefland, Florida:*

In the case of *Gray v. Leon County*, 118 So. 305, a warrant was issued by a justice of peace in Leon county and served by the sheriff in Manatee county. A constable of Leon county, upon being notified of the arrest, went to Manatee county, took the accused into custody and returned with him to Leon county. The court held that this was proper and that the constable was rightfully entitled to his fee. This case was approved by the Supreme Court of Florida in the case of 9 So. 2d 417.

In the light of the two cases cited, the question should be answered in the affirmative.

March 27, 1947.—047-86.

#### JURISDICTION—PLACE OF ARREST

QUESTIONS: 1. Does the law provide that violators arrested within a justice of the peace district be tried before the justice of the peace for that district?

2. If a defendant, residing in one district, was tried before a judge in an adjoining district, has he the right of appeal for a trial before the resident justice of the peace? And if so, what is the proper procedure to follow?

*To Honorable L. R. Scaffe, Justice of the Peace, Volusia County, DeLeon Springs, Florida:*

I answer the first question in the negative. Where a violator of the law is arrested does not determine the jurisdiction of the justice to try



him for said violation. Where the crime is committed determines such jurisdiction (section 37.01, F.S.A., 1941, subsections 2 and 3).

I do not answer the second question because I think it would be highly improper for me to do so. The procedure which this defendant should follow must be determined by him and his counsel.

August 5, 1947.—047-257.

#### MISDEMEANORS—TRIAL JURISDICTION OF JUSTICE

**QUESTION:** Does a justice of the peace of Pasco county have trial jurisdiction in misdemeanor cases where the penalty is not more than \$100 fine or 90 days in jail, or both?

*To Honorable Chester B. McMullen, State Attorney, Clearwater, Florida:*

Section 22 of article 5 of the Constitution of Florida provides that justices of the peace shall have jurisdiction in such criminal cases, except felonies, as may be prescribed by law.

Subsections 2 and 3 of section 37.01, Florida Statutes, 1941, bestow trial jurisdiction in certain misdemeanor cases upon justices of the peace in counties having a population of over 50,000, but these provisions do not apply to Pasco county because it does not have a population of 50,000.

Section 37.24, Florida Statutes, 1941 (1945 Cumulative Supplement to Volume One), provides that justice of the peace courts located forty, or more miles from the county seat in counties having a criminal court of record shall have the power to try misdemeanor cases in which the penalty is not more than a fine of \$100 or imprisonment for not more than 90 days, or both.

It will be noted that section 37.24 applies only to counties having a criminal court of record. Pasco county does not have a criminal court of record, although it has a statutory court of record, with civil and criminal jurisdiction, which was set up by chapter 22837, acts of 1945. Therefore, it is my opinion that said section 37.24 is not applicable to Pasco county.

I know of no other statute which would authorize a justice of the peace in Pasco county to exercise any trial jurisdiction in criminal cases, and, therefore, the question must be answered in the negative.

July 9, 1947.—047-195.

#### TRIAL OF MISDEMEANORS—CRIMINAL COURT OF RECORD

**QUESTION:** Can a justice of the peace legally try persons charged with committing misdemeanors in Palm Beach county, in which the penalty is not more than one hundred dollars fine, Palm Beach county having a criminal court of record?

*To Honorable W. F. Reedel, Justice of the Peace, Lake Worth, Florida:*

In the case of *Jackson v. State*, 15 So. 250, our supreme court said:

"In counties where there are criminal courts of record, justices of the peace have, in criminal causes, no trial jurisdiction, as distinguished from mere power, as committing magistrates, to inquire into criminal charges with reference to the detention for trial, or bail or discharge, of the accused."

The Supreme Court of Florida, in this case, based its decision upon article V of section 25 of our constitution, which says:

"The said courts (criminal courts of record) shall have jurisdiction of all criminal cases, not capital, which shall arise in said counties respectively."

I do not know, as you did not give me the information, whether or not your justice court is located a distance of forty miles from the county seat.

In 1943 by chapter 22118, now section 37.24, Florida Statutes, 1941, the Legislature sought to give justice of the peace courts located a distance of forty miles from the county seat in counties having criminal courts of record, power to hold a court to try and determine misdemeanor cases in which the penalty is not more than a fine of one hundred dollars and ninety days in jail, or both such fine and imprisonment, with certain provisions and requirements to be complied with by the justices of the peace.

I do not pass upon the constitutionality of this act as I feel that this is the duty of the courts.

If, therefore, you do not come within the provisions of section 37.24, supra, you have no jurisdictions to try misdemeanors. If, however, you have complied with and do come within the provisions of section 37.24, I refrain from giving an opinion as to jurisdiction because of the constitutionality of the section which is necessarily involved.

July 28, 1947.—047-229.

#### EXPENSES—OUT-OF-STATE TRAVEL—RETURNING PRISONER

**QUESTION:** Application was made to the justice of the peace of the fifth district for a warrant charging a prisoner with embezzlement of \$500.00. The warrant when issued was delivered to the legal constable of this district, who began a systematic campaign to locate the accused. The accused was found in Norfolk, Virginia, and arrested and held there by the authorities at the direction of the constable. There was no question whatever about the embezzlement having been committed by the accused and that it occurred in the said district. The constable spent some time and some money in locating the accused. The accused left Lakeland, Florida, the night following the commission of the crime, leaving no address. Does the constable have the right to bill the county for the expense of going from Lakeland to Norfolk, Virginia, for this prisoner and returning him to Polk county for prosecution?

*To Honorable Pat Gordon, Constable, Fifth Justice District, Polk County, Lakeland, Florida:*

Under the facts as outlined in the question, I know of no reason why the constable does not have the right and the authority to bill the county commissioners of Polk county for the expenses incurred in going and getting this prisoner from Virginia; the county commissioners have the power to pay for these services. Had the sheriff performed the same services, there is no question but that he would be entitled to his fee. See section 30.23, Florida Statutes, 1941, which section not only applies to sheriffs but also to constables.

Furthermore, under section 941.07, Florida Statutes, 1941, had it been necessary to extradite this man the governor could have appointed you to go and get this prisoner and return him to Florida, in which case you would have been entitled to your fee.

Inasmuch as the prisoner waived extradition and you succeeded in returning him to Lakeland, I see no reason why you would not be entitled to your fee for same.

Please do not understand from this opinion that you are entitled to receive from the county fees for each and every similar service rendered; for instance, if the crime had been a misdemeanor, or one where a conviction is doubtful, I do not think that you would be justified in going and getting this man and expecting a fee therefor. I would suggest, therefore, that before you make similar trips you ascertain from the prosecuting attorney of the court having jurisdiction of the crime, the necessity of the journey.

May 9, 1947.—047-132.

#### TEMPORARY ABSENCE—VACANCY IN OFFICE

**QUESTION:** May the governor appoint temporarily a person to handle the duties of a justice of the peace while said justice is temporarily absent from his district?

*To Honorable Millard F. Caldwell, Governor:*

I am of the opinion that the question must be answered in the negative inasmuch as these circumstances do not constitute a vacancy in office.

Section 37.22, Florida Statutes, 1941, specifically provides that if a justice of the peace is unable from any cause to try any criminal case, the same may be tried before any other justice of the peace of the county, or before the county judge.

#### SHERIFFS

November 1, 1947.—047-367.

#### COMMITMENT DEFINED—SHERIFF AND CONSTABLE FEES

**QUESTION:** Since the amendment to section 30.23, Florida Statutes, 1941, by chapter 22587, acts of 1947, by which the Legislature amended the following language, "Commitment to jail of prisoner arrested by him" to read "commitment to jail of prisoner," who is entitled to the fee therein provided?

*To Honorable John W. Muskoff, Attorney, Florida Sheriffs' Association, Jacksonville, Florida:*

Before section 30.23, Florida Statutes, 1941, was amended by chapter 22587 in 1945, it provided that:

"The fees to be charged by the sheriffs of the several counties of the State of Florida shall be as follows:

\* \* \* \* \*

"Commitment to jail of prisoner arrested by him \$1.00"  
and section 37.20, Florida Statutes, 1941, provided that the fees of constables should be the same as were allowed sheriffs for like services.

In 1945, chapter 22587 amended section 30.23 to read as follows:

"The fees to be charged by the sheriffs and constables of the State of Florida shall be as follows:

\* \* \* \* \*

"Commitment to jail of prisoner \$1.50."

Although chapter 22587 omitted the words "arrested by him," it specifically provided that the sheriffs and constables should be paid the fees therein enumerated, thereby evidencing legislative intent that constables, as well as sheriffs, should be paid the fees for such of the enumerated services as they actually perform.

This brings up the question of whether constables, as well as sheriffs, "commit" prisoners to jail.

What does an officer do when he "commits" a prisoner to jail?

I find "commit" defined in Webster's New International Dictionary, 2nd Edition, as follows: "To give in trust; to put into charge or keeping; entrust; consign—used with to, unto"; "To put in charge of a jailer; to imprison."

One of the definitions of "Commit" given by the Twentieth Century Dictionary is "to put into custody or charge."

Words and Phrases, volume 7, page 832, says: "'Committed' is the act of carrying a person to prison after his arrest. *French v. Bancroft*, 42 Mass. (1 Metc.) 502, 504."

22 Corpus Juris Secundum, 510, "Criminal Law," section 349, defines "Commitment" as follows: "The word 'Commitment' has in law a well defined meaning, and signifies the act of sending an accused or convicted person to prison; the sending of a person charged with an offense to prison."

In my opinion, these definitions show that, in order for an officer to commit a person to jail, he must perform the positive act of sending or carrying the prisoner to jail, and that the passive act of receiving the prisoner into the jail after he is carried there is not a commitment.

Section 839.21, Florida Statutes, 1941, makes it a criminal offense for the jailer to willfully refuse to "receive" into the jail a "prisoner lawfully directed to be committed thereto." This statute is in line with the above quoted definition in that it recognizes that it is one thing to "commit" a prisoner to jail and another thing to "receive" the prisoner into the jail.

It is my opinion that, where an officer, whether sheriff or constable, carries a prisoner to jail under a written commitment or order of court, that officer executes the commitment and is entitled to be paid the statutory fee therefor; and, further, that if the jailer accepts a prisoner whom an officer, whether sheriff or constable, wishes to commit without a written commitment or order, that sheriff or constable has committed the prisoner to jail and is entitled to the commitment fee therefor.

The rule is that where the law imposes a duty upon an officer, but provides no compensation for the performance thereof, the officer must perform the duty without compensation. The act of the jailer in receiving the prisoner into the jail falls within this rule, because the law provides no compensation for that service.

This opinion is in accord with my opinion of March 17, 1945, in which I said, in part:

"In the light of section 839.21, Florida Statutes, 1941, I do not think that the jailer's act in receiving a prisoner into the jail constitutes a commitment; rather, the commitment is the officer's act in carrying the prisoner to the jail and placing him in the jailer's custody."

This opinion is also in line with my opinion of April 4, 1946, in which I said that:

"If the commitment is directed to a constable and he executes same by taking the prisoner to jail, he is entitled to the fee. If the commitment is directed to the sheriff and the sheriff executes the same by taking the prisoner to jail, he is entitled to his fee."

This opinion is also in harmony with former Attorney General Landis' opinion of September 8, 1931, in which he indicated his view that a constable commits a prisoner to jail when he delivers him to the jailer; and with his opinion of June 4, 1932, that where a constable delivers a prisoner to the jailer, and a proper commitment has been issued, the constable is entitled to a commitment fee; and with his opinion of July 12, 1934, that the receipt of a prisoner into a jail is not, under the law, considered a commitment, and that a constable who brings a prisoner to jail for receipt and safe-keeping is entitled to the commitment fee.

August 4, 1947.—047-276.

#### SERVICE OF WARRANT—CUSTODY OF PRISONER—ARREST FEE

QUESTION: Must a sheriff or other peace officer serve an arrest warrant coming into his hands for service even though the person to be served is already in custody on another charge, and if so, is the officer entitled to an arrest fee for such service?



*To Honorable John W. Muskoff, Attorney, Florida Sheriffs' Association,  
Jacksonville, Florida:*

Section 30.15, Florida Statutes, 1941, reads as follows:

"Each sheriff shall, in person or by deputy, execute all process of the supreme court, circuit court, county court and criminal court, and board of county commissioners to be executed in the said courts, and such process of justice of the peace courts as may come to his hands to be executed."

Section 144.01, Florida Statutes, 1941, reads in part, as follows:

"The sheriffs, in their respective counties, shall execute all writs, processes and warrants directed to them . . ."

Section 839.20, Florida Statutes, 1941, reads as follows:

"If any officer authorized to serve process, willfully and corruptly refuses to execute any lawful process to him directed and requiring him to apprehend and confine any person convicted or charged with an offense, or willfully and corruptly omits or delays to execute such process whereby such person escapes and goes at large, he shall be punished by imprisonment not exceeding one year, or by fine not exceeding five hundred dollars."

Our supreme court in construing the above sections, or some of them, with reference to the serving of warrants, in the case of *Osceola county vs. State ex rel Newton*, 155 So. 119, 120, says:

"... under the statute it is made the duty of sheriffs and constables to serve all warrants coming into their hands which are fair and valid on their face, in default or neglect of which they are subject to certain penalties. See section 7522, C.G.L., section 5383, R.G.S., section 4594, C.G.L., section 2896, R.G.S."

Therefore, in my opinion, the sheriff or other officer authorized to serve process, must serve warrants against a defendant therein named coming into his hands for service even though such defendant may be in custody on another or other warrants.

It is also my opinion that the officer in serving such a warrant is entitled to his arrest fee.

I am not unmindful of the ruling in some of the other states which holds that where a sheriff arrests a person against whom he holds several warrants, he is entitled to but a single fee and not a fee for each warrant. (57 C.J., Paragraph 1156, Sheriffs and Constables, page 1114.)

This rule has not been made applicable in Florida by either statute, court construction or attorney general's opinion.

This opinion is limited and has reference only to arresting fees.

August 4, 1947.—047-256.

#### ARREST BY PATROL—FEES ENTITLED

QUESTION: To what fees are the sheriffs entitled since the amendment to section 321.05, Florida Statutes, 1941, by chapter 23724, acts of 1947?

*To Honorable John W. Muskoff, Attorney, Florida Sheriffs' Association,  
Jacksonville, Florida:*

Chapter 23724, acts of 1947, amends section 321.05, Florida Statutes, 1941. Section 321.05, Florida Statutes, 1941, is paragraph 5 of chapter 20451, Laws of 1941.

In an opinion to the state auditor, made by me on October 21, 1941, I held that "under this statute (chapter 20451, section 5), when a person



arrested is delivered to the sheriff at the county seat or when a bond accepted and approved by the state highway patrolman is delivered to the sheriff, all fees accruing thereafter, that is, all fees for services rendered by the sheriff after the moment of the delivery of the arrested person, or the bond, are to be paid to the sheriff as in other criminal cases."

Since this opinion was rendered by me, the 1947 Legislature amended said section 5 of chapter 20451, acts of 1941, by enacting chapter 23724, Laws of Florida, 1947. The said section 5 of chapter 20451, acts of 1941, was amended only in one material matter and that is, that the word "thereafterwards" appearing in the sentence "and all fees accruing thereafterwards shall be taxed against the party arrested," is omitted from chapter 23724, acts of 1947.

The question to be considered, therefore, is, to what fees are the sheriffs entitled since the word "thereafterwards" has been omitted from said chapter 23724, acts of 1947.

Said chapter 23724, acts of 1947, material to this opinion reads as follows:

"All fines, costs and the proceeds of the forfeiture of bail bonds and recognizances resulting from the enforcement of this chapter by patrol officers shall be paid into the fine and forfeiture fund of the county where the offense is committed. In all cases of arrest by patrol officers the person arrested shall be delivered forthwith by said officer to the sheriff of the county or he shall obtain from such person arrested a recognizance or, if deemed necessary a cash bond or other sufficient security conditioned for his appearance before the proper tribunal of such county to answer the charge for which he has been arrested and all fees accruing shall be taxed against the party arrested, which fees are hereby declared to be part of the compensation of said sheriffs authorized to be fixed by the legislature under section 6, article VIII of the Constitution, to be paid such sheriffs in the same manner as fees are paid for like services in other criminal cases. . . ."

Since the enactment of chapter 23724, what are "all fees accruing which shall be taxed against the party arrested?" The patrol officer is not allowed to charge any fees; the sheriff is prohibited from charging constructive mileage (section 30.27, Florida Statutes, 1941). In fact, there are no costs accruing before the delivery of the arrested person or the bond to the sheriff.

It is my opinion, therefore, that the sheriff is entitled to fees for services rendered by him only after the moment of the delivery of the arrested person or the bond to him, and these are to be paid to the sheriff as in other criminal cases.

May 21, 1947.—047-148.

#### OUT-OF-STATE TRIPS—EXPENSE

**QUESTIONS:** A defendant was arrested on a justice of the peace warrant. A governor's warrant was issued from Florida and honored by the governor of the state of New York. Habeas corpus proceedings were instituted and the defendant was released on bond returnable April 18. The deputy named in the governor's warrant was in New York ready to take delivery of the prisoner on April 18. The case was continued until April 21, then to April 23, and then to May 19. After the case was again continued on April 23, the officers were ordered back to Tampa.

1. Would it be proper for the county commissioners to refuse to pay any part of expenses due to the fact that prisoner was not returned?
2. Is the sheriff entitled to two way mileage for officers and guard plus delay expenses from April 18 thru April 23, or

3. Is he entitled to full reimbursement of all legitimate expenses incurred on this trip to include delay expenses?

4. Does the expense on this trip stand on its own feet or should it be held in abeyance pending another trip if and when made?

*To Honorable Hugh Culbreath, Sheriff, Hillsborough County, Tampa, Florida:*

Section 30.24, Florida Statutes, 1941, reads as follows:

"The sheriffs of the several counties, when required to go beyond the limits of this state to bring back a prisoner charged with any offense, or who has been convicted of any crime in this state, and has escaped, shall charge the sum of seven cents per mile for the actual distance traveled beyond the limits of this state, together with the same mileage for his prisoner, and in addition thereto he shall receive the actual and necessary expense on account of returning the prisoner to the state of Florida."

In answer to the first question, I quote herein an opinion rendered by the Honorable Fred H. Davis, former attorney general in 1928, wherein he stated:

"The right of the sheriff to compensation is not made to depend upon the success of the sheriff in securing the actual return of the prisoner to this state in his custody. When the sheriff in good faith performs the services demanded of him in executing a proper requisition, such sheriff has earned his compensation and should be paid the same without question."

In this opinion I concur.

I, therefore, answer the first question in the negative.

In answer to the second and third questions, on June 5, 1942, I rendered an opinion on a similar question in which I stated that a sheriff can charge seven cents a mile for one officer, going and returning, in returning prisoners from without the State of Florida into the State of Florida for the actual distance traveled beyond the limits of this state. Honorable T. F. West, former attorney general of this state, rendered an opinion in which he stated:

"When a sheriff is requested to go beyond the limits of the state of Florida for a prisoner and has requisition of the governor of this state upon the governor of the state where the prisoner is found for such prisoner, the sheriff is entitled to mileage although he does not return the prisoner in a case where the prisoner is discharged by the court upon a habeas corpus proceeding."

Quoting further from the above opinion of the Honorable Fred H. Davis:

"When a sheriff of this state, armed with a proper requisition appointing him as agent of the state, to convey a prisoner back to this jurisdiction for trial on a criminal offense duly charged against him in this state, goes out of the state for the purpose of apprehending and bringing back the prisoner named in the requisition I am of the opinion that he is entitled to his mileage and other proper costs from the state to the point where the prisoner is held and returned—even though the prisoner should give bond in the asylum state or through no fault of the sheriff should be released for habeas corpus proceedings or otherwise in the asylum state."

In my opinion, you are, therefore, entitled to charge two way mileage for the officer and his necessary and reasonable expenses if he has been delayed by such legal action as you mention, and the necessary and reasonable expenses of the guard who accompanied this officer; it being common

knowledge that it is often necessary to have a guard accompany the officer as it would in many instances be most dangerous for one man to attempt to return a dangerous fugitive to the state. Such expense to be itemized on bills to the county and receipts for the major items of expenditure, other than meals, should be attached to the bill.

In answer to the fourth question, this is a matter which would be within the discretion of the county commissioners; however, I see no reason why they cannot pay you the mileage and the expense of this trip and not wait until another trip is made, if same is made.

April 18, 1947.—047-106.

#### COUNTY BUDGET BOARD—POWERS—PURCHASE OF EQUIPMENT

QUESTION: The Budget Board of Dade county was requested to supplement the budget of a sheriff's office in the sum of \$10,500 for the purpose of employing four additional men in the criminal division and purchase two additional radio equipped and controlled automobiles. The Budget Board declared that the statutes do not give it the right to increase the budget of the office as the budget when adopted was final and had the force and effect of fixed appropriation. Does the sheriff have the right as a fee officer whose duty it is to see that the laws are properly enforced, to exercise his own judgment and discretion in purchasing the aforesaid additional equipment and hire the aforesaid additional men?

*To Honorable Jimmy Sullivan, Sheriff, Dade County, Miami, Florida:*

I assume that the Dade County Budget Board is operating under and by virtue of chapter 14678, Laws of 1931.

On May 24, 1934, Attorney General Landis gave an opinion to the Budget Board of Orange County, Florida, to the effect that in a case where a tax collector of that county was unable to render to the public the service required and stay within the budget allowance made to him, that the Budget Board could file a supplemental budget making such allowance as the Budget Board found necessary in order that the tax collector could in a proper manner take care of unexpected and unforeseen work which developed in his office and was unforeseen by the Budget Board at the time the original budget was made.

The same attorney general on March 30, 1936, gave an opinion to the Hillsborough County Budget Board, which was operating under chapter 14678, acts of 1931, to the same effect.

I concur in both of these opinions.

In my opinion the Budget Board of Dade County, Florida, if it determined that the aforementioned requirements are absolutely necessary for the proper law enforcement of the county and that such additional necessary amounts were unforeseen by the Budget Board when it made up its original budget, could adopt a supplemental budget; provided, of course, the same requirements are met when adopting the supplemental budget as were required in the adoption of the original budget.

However, if the Budget Board does not consider such requirements necessary and refuses to adopt a supplemental budget, in my opinion, it would not be permissible for the sheriff to purchase the said articles or hire the said help, and, in effect charge the expenses to the county. To hold otherwise would render the Budget Board a useless body.

February 18, 1947.—047-43.

#### SERVICE OF PROCESS—CONSTABLE

QUESTION: May writs, processes, executions and commitments issuing from the circuit court and the court of record of Escambia county be legally served by a constable within the county?

*To Honorable R. L. Kendrick, Sheriff, Escambia County, Pensacola, Florida:*

The answer to the foregoing question is governed by the application and effect of chapter 22790, Laws of Florida, 1945, by the terms of which all prior statutes dealing with the subject were consolidated to avoid the confusion which might result from there being in force at the same time separate and several sections of Florida Statutes dealing with the same subject. Prior to the enactment of chapter 22790, section 30.15, Florida Statutes, 1941, provided:

"Each sheriff shall, in person or by deputy, execute all process of the supreme court, circuit court, county court and criminal court, and board of county commissioners to be executed in the said courts, and such process of justice of the peace courts as may come to his hands to be executed."

Chapter 22790 amended section 30.15 to read as follows:

"Sheriffs, in their respective counties, in person or by deputy, shall:

"1. Execute all process of the supreme court, circuit courts, courts of record, civil courts of record, county courts, criminal courts and boards of county commissioners, of this state, to be executed in their counties;

"2. Execute such process of the county judges' courts and justice of the peace courts, as may come to their hands to be served in their counties."

The later chapter extended the authority, power and duty of the sheriffs of respective counties to include the execution of processes issuing out of courts of record and civil courts of record not comprehended by the statutes in effect at the time of the enactment of chapter 22790.

Chapter 22790 repealed all laws or parts of laws in conflict therewith.

Under the law as it now exists, service of process is required to be executed by the sheriff of the county in all cases where the writ issues out of all courts of the judicial system except county judges' courts, juvenile courts and courts of the justices of the peace. Under existing law, a constable is not authorized to execute writs, processes, executions and commitments issued by the circuit court or by the court of record of Escambia county.

April 7, 1947.—047-99.

#### SALARIES FOR GUARDS—DELIVERY OF PATIENTS

QUESTIONS: 1. Is the sheriff of Liberty county entitled to reimbursement for guards and servants as provided by section 30.23, Florida Statutes, 1941, as amended? If so, in view of the sheriff's sole responsibility for the care and welfare of prisoners in the county jail, is the sheriff the sole judge of who and how many guards and servants are employed?

2. Is the sheriff of Liberty county entitled to costs for delivery of patients to the State Hospital, and of boys and girls to the State Industrial schools as provided by section 30.23, Florida Statutes, 1941?

3. Is the sheriff of Liberty county entitled to costs provided by law for sheriffs in general for services performed in the holding of inquests?

4. Is the sheriff of Liberty county entitled to reimbursement for costs paid by him for services rendered by sheriffs of other counties?

5. Is the sheriff of Liberty county entitled to the compensation provided by law for attendance at meetings of the county commissioners?



*To Honorable S. G. Revell, Sheriff, Liberty County, Bristol, Florida:*

Chapter 20643, Laws of 1941, says:

"Section 2. That the sheriff of Liberty county, Florida, shall receive the sum of Six Thousand (\$6,000.00) Dollars per annum, payable in twelve monthly instalments of Five Hundred (\$500.00) Dollars each to be paid by warrants drawn by the board of county commissioners of Liberty county, Florida, upon the Fine and Forfeiture Fund of such county for his services as sheriff of said county, which said sum shall be in lieu of any and all other fees except for feeding prisoners and except for making trips outside of the state of Florida; that he shall receive in addition to the above mentioned compensation the fees for feeding prisoners as is provided for by general law and that in addition thereto he shall be paid for bringing prisoners back to Liberty county from any point outside of the state of Florida as is provided for by the general law."

I do not attempt to pass upon the constitutionality of this act.

Answering the first question, it seems to me that it was the clear intent of the Legislature by this chapter to restrict the sheriff's compensation to six thousand dollars per year.

However, if guards and servants are necessary for the safekeeping of prisoners entrusted to the sheriff, I think he should be reimbursed for the actual and necessary expense of such guards and servants, bill for same to be approved by the judge as provided in section 30.23, Florida Statutes, 1941, as amended by laws of 1945.

In view of chapter 20643, Laws of Florida, 1941, above cited, I answer the second, third and fifth questions in the negative.

In answer to the fourth question, I do not think that chapter 20643, laws of 1941, was intended to cover reimbursement for necessary and legitimate costs paid by the sheriff for services rendered by sheriffs of other counties. I, therefore, answer this question in the affirmative.



## CHAPTER V

### CIVIL PRACTICE AND PROCEDURE

#### CONSTRUCTIVE SERVICE OF PROCESS

July 10, 1947.—047-193.

##### PROOF OF PUBLICATION—COMPULSORY RECORDING

QUESTION: Since the passage of house bill No. 14, being chapter 23825, acts of the Legislature, 1947, is it necessary to record proof of publication as well as orders of dismissal, final judgments and final decrees?

*To Honorable Ray E. Green, Clerk of Circuit Court, Pinellas County, Clearwater, Florida:*

Said chapter 23825 in part says:

"Section 1. No written order, judgment or decree, except an order of dismissal, a final judgment or a final decree, in any action at law or suit in equity in any of the several courts of the State of Florida shall be recorded in the minutes of the court or the chancery order book, unless the court, on oral or written motion of any party to the cause, or of its own motion, shall order its recordation. Every order of dismissal, final judgment and final decree shall be recorded.

"Section 2. Orders, judgments and decrees not recorded pursuant to the provisions of this act shall be equally valid as if recorded."

Section 48.08, Florida Statutes, 1941, speaks of "notices to appear" and section 48.10 also refers to "notices to appear" and provides that proofs of publications of said notices shall be recorded.

To those familiar with the practice at the time when section 48.10 was passed requiring the recording of the proofs of publication, they will remember that this law was urged upon the Legislature for it had developed that in many instances proofs of publication had been lost from the files of the several clerks of the circuit court, and therefore, in many instances it was never able to be ascertained whether or not the court in many of its decrees had obtained jurisdiction of the defendants. For this reason the proofs of publication by the Legislature were ordered to be recorded.

I feel as if a proof of publication which shows the jurisdiction of the court over the defendant is just as important as an order of dismissal, a final judgment or a final decree, and that the same should be recorded, and I do not think that the Legislature when it passed chapter 23825 intended that proofs of publication should no longer be recorded.

I, therefore, answer the question in the affirmative.

#### COURT COSTS

May 27, 1948.—048-180.

##### LUNACY PROCEEDINGS—STATE CONVICTS—REFUND TO COUNTY

QUESTION: Where Union county, Florida, paid a total of one hundred seventy-two dollars in costs to its county judge in connection with lunacy proceedings against state convicts, said proceedings having been had and such costs paid by the county between November 1, 1939, and February 2, 1948, and application for refund thereof having been made

on or after April 12, 1948, should the state comptroller at this time pay the said claim or any part thereof?

*To Honorable C. M. Gay, State Comptroller:*

It appears, from the evidence furnished with the request for opinion, that such costs cover a period of more than eight years, the last item thereof having been paid by the county on February 2, 1948, and application, under section 58.10, Florida Statutes, 1941, having been made on or after April 12, 1948. The letter of transmittal and the certificate of the clerk each bear date of April 12, 1948. For the purposes of this opinion we shall presume that the accounts and items stated in the claim are correct and will consider only the legality of the claim and the right of the state officials to pay the same at this time.

This question requires a construction of said section 58.10 (a part of chapter 19272, Laws of Florida, acts of 1939, which became effective June 5, 1939). It provides that the state shall refund to the county "all lawful costs . . . legally adjudged against and paid by any county in all lunacy proceedings . . . against state convicts . . . and shall refund to the county paying the same . . . in the manner and to the extent herein provided between the first and fifteenth of the month next succeeding the month in which any such cost has been allowed and paid by the county," and that "the clerk of the circuit court of the county shall make requisition upon the comptroller of Florida for all such costs so allowed and paid during the preceding month, giving the style of the cases in which the said cost was incurred, the amount and items of cost in each case, a certified copy of the judgment of the court adjudging the cost against the county, which said requisition shall show that the cost represented thereby has been paid by the county and shall be verified by the oath of said clerk, and to which shall be attached a certified copy of the cost bill or bills as approved and allowed by the board of county commissioners of the county . . ."

It appears from the quoted portion of the statute that claims for refund should be made:

- (1) Between the 1st and 15th of the month next succeeding "the month in which paid by the county";
- (2) A certified copy of the judgment adjudging the costs against the county should be furnished; and
- (3) The claim should be verified by the oath of the clerk.

None of these requirements appear to have been complied with in the making of this application for refund. These observations seem to raise the question of whether the said requirements are mandatory or merely directory and subject to waiver by the state officials in their discretion. We know of no court decision, or opinion of this office, determining this question.

Generally, words in statutes defining the duties of administrative officers may be construed as directory, unless the contrary is indicated (*Apgar v. Wilkinson*, 95 Fla. 457, 116 So. 78). Those related to the conduct of the office only are likewise directory (*Reid v. Southern Development Co.*, 52 Fla. 595, 42 So. 206).

The construction of the requirement that requisition be made upon the comptroller for repayment "between the first and fifteenth of the month next succeeding the month in which any such cost has been allowed and paid" is not simple of solution. Is it a statute of limitation? If a statute of limitation the claim is barred and should not be paid. The state constitution seems to contemplate the raising of "revenue sufficient to defray the expenses of the state . . . for each fiscal year." (Section 2, article IX.) This provision in the state constitution seems to indicate that costs accruing during any one year should have been paid from the revenue for that year. The claim in question includes costs over a period of several years. The requirement of the statutes mentioned herein may have been

to insure payment from current revenues. Conditions as to time for filing claims against the state (59 C. J. 290, section 444), a county (20 C. J. S. 1255, section 298), or a municipality (6 McQuillin Municipal Corporation, 2nd, 627, section 2632), have been held to be mandatory and jurisdictional.

In the light of these observations it seems that the claim was filed too late and should not be paid.

## ARBITRATIONS

August 25, 1948.—048-279.

### BREACH OF CONTRACT—ARBITRATION—AWARDS

**QUESTION:** Where an award made against the Board of Commissioners of State Institutions by a board of arbitration under chapter 57, Florida Statutes, 1941, contains an item of about \$25,608.82 awarded as damages for termination of contract without just cause (that is, tort arising out of a breach of contract), is such award valid and legal against the State of Florida?

*To Honorable C. M. Gay, State Comptroller:*

There was submitted along with the request for opinion two awards of arbitrators, one relating to the south wing of the state capitol and the other to an infirmary building at the Florida State Hospital at Chattahoochee, Florida, which awards are entitled in the Circuit Court of the Second Judicial Circuit of Florida, in and for Leon county, Florida. It seems clear from the file in the said circuit court that the arbitration was intended to be under chapter 57, Florida Statutes, 1941, under which the award becomes a rule of court having "the force and effect of a judgment from the date of entering the award upon which execution may issue as in cases of judgment usually entered . . ." (section 57.09).

Any power to create a liability upon the state treasury must be derived from the constitution or a statute (59 C. J. 193, section 335), so that the state cannot be liable for the torts of its officers or agents in the discharge of their duties unless it has voluntarily assumed such liability or consented to be so liable (59 C. J. 194, section 337; 49 Am. Jur. 288, section 76). Florida has not assumed such liability nor consented to be so liable. The general rule is that the exemption of the state from liability for torts of its officers and agents does not depend upon the state's immunity from suit without its consent but rests upon the ground of public policy, which denies the liability of the state for such damages (49 Am. Jur. 289, section 76). The appropriations for the construction of the buildings in question were provided by chapter 23882, Laws of Florida, acts of 1947, and an examination of said act, including section two thereof, reveals nothing that should be construed as permitting payment of a claim for tort in connection therewith. The stated question should be answered in the negative.

I think the parties claiming under the particular award to which this inquiry relates might submit their claims to the Legislature for its consideration and action.

## CHAPTER VI

### JUDICIAL PROOF

#### JUDICIAL PROOF; GENERALLY

August 22, 1947.—047-274.

##### WITNESS—VOLUNTARY ATTENDANCE—PAY OF WITNESS

**QUESTION:** Is a witness who is not subpoenaed, but who is sworn and testifies for the state in a criminal case in a criminal court of record, entitled to sign the pay roll and be paid for attendance for the day he testified?

*To Honorable Robert R. Taylor, County Solicitor, Miami, Florida:*

In my opinion, the question should be answered in the affirmative.

The rules as to compensation for voluntary attendance of a witness varies under the different statutes, the rule in some jurisdictions being that one who attends as a witness voluntarily and without being subpoenaed, or without being properly subpoenaed, is entitled to per diem and mileage; qualified in some jurisdictions by the holding that it is a subject proper for determination by the court in each instance arising, based on facts made to appear respecting the necessity of the witness' attendance and the circumstances under which he is called and remains in attendance on the court. (70 C. J., Witnesses, Section 64, page 68.)

Our supreme court has not passed directly upon this question, although dictum in the case of *Vilsack v. General Commercial Securities Corporation*, 106 Fla. 296, 143 So. 250, indicates that our court would approve the payment of per diem to an un-subpoenaed witness who testifies at the request of one of the parties to a suit.

The pertinent sections of the statutes relating to the compensation of witnesses, and the payment of same, are sections 90.14, 90.15, 142.04, 142.05, 142.06, and 142.07, Florida Statutes, 1941. None of these sections expressly requires, as a condition precedent to the payment of compensation, that the witness be subpoenaed. It is true that section 90.15, *supra*, provides that "Compensation shall be paid to the witness by the party in whose behalf he is summoned . . .", and that section 142.05, *supra*, provides that ". . . Said clerk shall make out a pay roll in duplicate giving the name of each witness summoned for the state before the court . . ." However, these two sections are to be construed in the light of the other pertinent sections, *supra*; and, when so construed, it is my opinion that the use of the word "summoned" was not intended by the Legislature to mean "subpoenaed" only, and therefore that a witness who appears upon the request of the state and testifies in its behalf is duly "summoned" within a reasonable construction of the statute.

This would seem to be the common-sense rule, since the additional expense of officers' fees and mileage for issuing and serving of a subpoena, adding to the costs of the case, could do no more than procure the attendance of the witness.

In my opinion, therefore, a witness who is not subpoenaed but who, at the request of the state, is sworn and testifies in its behalf, is entitled to sign the pay roll and be paid for attendance for the day he testifies.

This rule would apply equally to such witnesses, whether in the circuit courts, or in criminal courts of record. (Section 932.33, Florida Statutes, 1941.)



## CHAPTER VII

### LIMITATIONS

#### LIMITATIONS OF ACTIONS; ADVERSE POSSESSION

October 21, 1947.—047-354.

#### JUSTICE OF THE PEACE—BILL FOR SERVICES—UNDER-PAYMENT CLAIMED

**QUESTION:** One of the justices of peace in Lake county has recently sent to the Board of County Commissioners a claim for \$211.81, which he claims to be the amount underpaid on bills which he submitted on cases in his court covering the years, 1945, 1946 and 1947, up to and through June. The amounts previously paid were the bills as submitted by him which he claims were incorrect in that he failed to charge a sufficient amount thereon because of omitting certain items therein. Now assuming the amounts he claims to be correct amounts, does the Board of County Commissioners have authority to pay this amount?

*To Honorable George J. Dykes, Clerk, Board of County Commissioners, Tavares, Florida:*

Section 95.08, Florida Statutes, 1941, says:

"Every claim against any county shall be presented to the board of county commissioners within one year from the time said claim shall become due, and shall be barred if not so presented."

It is my opinion, therefore, that unless the claim made by the justice of peace was presented to the board within one year from the time it became due, the same is barred.

I think you can see the justness of this rule as said by the Arizona Court in the case of *Cochise County v. Wilcox*, 14 Ariz. 234, 238, 127 P. 758:

"The legislature evidently intended that a claim for services rendered the county by a clerk of the court, or any other person, should be presented to the board for allowance before such a time could elapse as to make it difficult to produce the evidence necessary to establish its correctness."

I do not think the case of *Cary v. State*, 190 So. 49, is applicable to the question involved herein.



## CHAPTER VIII

### ELECTORS AND ELECTIONS

#### QUALIFICATIONS AND REGISTRATION OF VOTERS

February 5, 1948.—048-46.

##### AGE FOR REGISTRATION—AGE OF PRIMARY VOTER

**QUESTION:** If a person becomes 21 years old before the general election, is he entitled to vote in the primary?

*To Honorable J. M. Hendrix, Supervisor of Registration, Inverness, Florida:*

The question, of course, involves the question of whether or not a person should be registered for the purposes of voting in the primary.

A person who shall become 21 years old between the date of the closing of the registration books and the date of the primary election, may be registered and be a qualified elector for such election, upon complying with the provisions of section 102.17, Florida Statutes, 1941. Thus, one who will not be 21 years old until a date later than the period mentioned may not properly be registered and therefore is not entitled to vote in such primary election.

February 11, 1948.—048-49.

##### REGISTRATION—ELIGIBILITY—LITERACY

**QUESTION:** Is a supervisor of registration authorized to register a person who is illiterate?

*To Mrs. Marie Bailey Struss, Supervisor of Registration, Nassau County, Fernandina, Florida:*

The question was answered in my opinion No. 046-76, dated February 21, 1946, as follows:

"An illiterate person, otherwise qualified, is entitled to registration. In addition to signing the registration book, an applicant for registration is also required to 'take and subscribe' to the oath required by Section 3, Article VI, Florida Constitution. (See also Sections 98.11 and 102.19, Florida Statutes, 1941.) The law relating to registration for primary elections sets forth the procedure with respect to illiterates. Section 102.21 (12), Florida Statutes, 1941. The laws relating to registration for the general election do not mention illiterates. However, it is pointed out that our constitutional provisions relating to the qualification and registration of electors do not deny the franchise to a person because of illiteracy. (See Sections 1, 2, 3 and 4, Article VI, Florida Constitution.) Furthermore, the word 'subscribe' as used in Section 3 of said Article VI, by the better general rule would seem to include the signature of a deponent by his mark, duly witnessed. Words and Phrases, Volume 40, page 455."

February 20, 1948.—048-68.

##### NEGRO—LITERACY—CHALLENGE

**QUESTION:** 1. May negroes be registered in the primary registration books as members of the democratic party?

2. Is there any literacy test in connection with the registration of a person?

3. May any person challenge the right of a prospective voter to vote unless such prospective voter signs an affidavit showing he did not vote for a person of any other party in the last general election?

*To Honorable John J. Moore, Secretary-Treasurer, Democratic Executive Committee, Martin County, Stuart, Florida:*

The questions are answered in their numbered order as follows:

(1) My opinion No. 045-334, Biennial Report of Attorney General, 1945-1946, page 189, seems to answer this question.

(2) No literacy test or other intelligence test is required by our constitution or statutes as a prerequisite to registration. As a matter of fact, section 102.21(12), Florida Statutes, 1941, specifically provides certain things to be done by the supervisor of registration when an applicant for registration in the primary registration books is unable to subscribe to the required oath because of illiteracy.

(3) Section 102.42, Florida Statutes, 1941, provides that any person offering to vote at a primary election may be challenged by any elector, and that no reason or ground for such challenge need be stated. Thereafter, the right of such challenged person to vote must depend upon his meeting the requirements set forth in said section. Since the procedure to be followed is clearly set forth in the section, it is considered that reference to the section meets the requirements of this question.

April 7, 1948.—048-121.

#### CONVICTION OF FELONY—REGISTRATION—DISQUALIFICATION

**QUESTION:** Is a person disqualified from registering to vote if he has been convicted in the federal court "of disposing or having in possession" government property, for which he received a sentence of one year and one day?

*To Honorable Lee Bailey, Supervisor of Registration, Calhoun County, Blountstown, Florida:*

It will be noted from the above question that the request for opinion does not clearly and particularly set forth the offense of which this person was convicted. However, since it is stated that for such offense this person was sentenced for the period of one year and one day, it is here assumed that he was convicted of a felony, as such is defined in title 18, section 541, U.S.C.A., and this opinion is conditioned upon that assumption.

Section 98.01(4), Florida Statutes, 1941, provides that, "Persons who may have been convicted of any felony by any court of record," shall not be entitled to vote; and section 98.01(5) provides, in part, that "Persons who may have been convicted of bribery, perjury or larceny, or of any infamous crime in any court of this state, or any other state," shall not be entitled to vote. Attention is also directed to the provisions of our constitution concerning these same disqualifications as they appear in article VI, sections 4 and 5.

As a prerequisite to registration, an applicant is required to take and subscribe to the oath required by article VI, section 3, Florida Constitution (see also, sections 98.11 and 102.19, Florida Statutes, 1941), which oath contains the following, among other things, "and I am qualified to vote under the constitution and laws of the State of Florida."

In view of the foregoing and conditioned as mentioned, in my opinion the person described in the question is not qualified to register as an elector. It is assumed, of course, that he has not had his civil rights restored.

November 20, 1947.—047-384.

FOREIGN-BORN REGISTRATION—SPOUSES OF CITIZENS—  
REREGISTRATION

QUESTIONS: 1. Is a naturalized citizen, in connection with reregistration, required to produce to the registration officer at the time of and before such reregistration a certificate of naturalization or a duly certified copy thereof, as contemplated by article VI, section 1, Florida Constitution, and section 98.01, Florida Statutes, 1941, when the registration book in connection with such person's previous registration evidences that he is a naturalized citizen?

2. Do the foreign-born spouses of American citizens automatically become citizens of this country as result of marriage?

*To Mrs. Tuttle Smith, Supervisor of Registration, Ft. Myers, Florida:*

Article VI, section 1, Florida Constitution, and section 98.01, Florida Statutes, 1941, both contain the provision that "naturalized citizens of the United States, at the time of and before registration shall produce to the registration officer their certificates of naturalization or duly certified copies thereof, and shall make oath that they are the identical persons named in such certificate, before they shall be allowed to register." Among other things, section 102.21, Florida Statutes, 1941, requires the supervisor of registration, with respect to a foreign-born applicant for registration, to obtain and enter information concerning "the time, place and court of naturalization or declaration as evidenced by the legal proof thereof, exhibited by such person." The "legal proof," as mentioned in said section 102.21, is met by the production of the certificate or copy thereof and oath of the applicant for registration as required by the above constitutional provision and said section 98.01.

The questions are answered in their numbered order as follows:

(1) The requirement of the mentioned constitutional and statutory provisions that a naturalized citizen at and before registration shall produce a certificate of naturalization or certified copy thereof, is reasonable and apparent. Among other qualifications of such a foreign-born applicant, the registration officer must determine from such certificate or certified copy and oath of the applicant that the applicant is a naturalized citizen. If such an applicant for registration previously registered before the same registration officer, and that officer is satisfied from his previous examination of the applicant and of the certificate of naturalization or copy thereof produced by the applicant at the time of his previous registration that the applicant is a naturalized citizen as evidenced thereby, there is no necessity for the applicant to produce such certificate or copy at the time of such application for reregistration. However, registration book entries made by another registration officer in connection with a previous registration of such applicant for reregistration would not warrant the waiver of the necessity that the applicant produce such certificate or copy at the time of and before reregistration.

(2) Foreign-born spouses of American citizens are permitted entry into this country under circumstances provided by the federal laws. For example, with respect to admission of alien spouses and minor children of members of the United States armed forces during the Second World War, see title 8, section 232, U.S.C.A. However, I find no federal law granting citizenship to such a spouse by reason of marriage to an American citizen; and it appears that the ruling of this office of June 10, 1946 (see part of opinion No. 046-252, Biennial Report of Attorney General 1945-1946, page 160), is still applicable, viz.:

"If a woman desires to prove her citizenship by a marriage to a citizen of the United States prior to September 22, 1922, she should show you her marriage certificate, or convince you in some way that she was married to a citizen of the United States prior to

September 22, 1922, because since the said date an alien woman's marriage to a citizen of the United States does not because of such marriage make her a citizen of the United States."

Hence, the foreign-born spouse of an American citizen, who married subsequent to September 22, 1922, is required, at the time of and before registration, to produce her certificate of naturalization or duly certified copy thereof, and make the oath required by aforesaid article VI, section 1, and section 98.01.

March 11, 1948.—048-87.

#### REGISTRANT—DESIGNATION OF PARTY—PEOPLES PROGRESSIVE PARTY

**QUESTION:** Should a supervisor of registration with respect to applicants for registration in the primary registration books who state they desire to register as members of the "Peoples Progressive Party," so they may vote for Wallace, register such applicants as affiliates of such party?

*To Mrs. Dove C. Falls, Supervisor of Registration, Dade City, Florida:*

Subject to certain exceptions not here of moment, section 102.02, Florida Statutes, 1941, provides, among other things, that a political party within the meaning of our primary election laws (chapter 102, Florida Statutes, 1941, as amended) shall be any party "which at any time within four years next preceding a primary election may have had registered as members thereof more than five per cent of the total registered electors of Florida." Since percentage of registration is thus made a factor in determining a "political party," as defined, it is my opinion that an applicant for registration in the primary registration books who states his party affiliation as indicated in the question, supra, is entitled to be registered in said books as an affiliate of such named party.

The answer has to do entirely with the right of registration; and it is particularly noted that this opinion does not deal with the right of any such applicant to vote in the primary election.

February 6, 1948.—048-47.

#### REGISTRATION PLACE—HEALTH OF REGISTRANT

**QUESTION:** Is it the duty of a registration officer in St. Lucie county to register a person at a place other than the place where the law contemplates the registration books shall be kept open for registration, because such person is physically unable to present himself at such latter place?

*To Mrs. Estelle Godfrey, Supervisor of Registration, St. Lucie County, Fort Pierce, Florida:*

It is assumed that the general laws of Florida pertaining to registration are in force in St. Lucie county, and this opinion is conditioned upon such assumption.

Our general laws, which relate to registration in the primary and general election registration books, contain no provision for the registration of a person at a place other than the regularly designated places of registration. Sections 98.22, as amended, 102.09 and 102.17, Florida Statutes, 1941, prescribe the times the registration books are open in the hands of district registration officers and the supervisor of registration. The law would seem to contemplate that the books shall be open for registration either in the office of the supervisor, or at such places in the respective districts as may be designated by the district officers in the posted notices required of such latter officers by sections 98.22, as amended, and 102.09. On this point see Application of Lennox, 201 N.Y.S. 326.



In my opinion the question is properly answered as follows:

The duty devolves upon registration officers to register persons only at those places where under the law it is contemplated the books shall be kept open for registration; that is to say, during the periods prescribed by our statutes, in the office of the supervisor of registration, or in such places in the election districts as the respective district officers shall designate, as provided by law.

February 15, 1948.—048-55.

#### REGISTRATION PLACE—PUTNAM COUNTY

**QUESTION:** In view of the provisions of chapter 22451, Laws of Florida, Special Acts of 1943, may the supervisor of registration of Putnam county, Florida, lawfully carry the registration books from her office in the courthouse of said county into the several voting districts of the county for the purpose of registering persons in such books?

*To Mrs. Jessie Tinsley Carswell, Supervisor of Registration, Putnam County, Palatka, Florida:*

At the outset, it is assumed that chapter 22451 is valid legislation and this opinion is conditioned upon such assumption.

Section 1, chapter 22451, which became a law on May 13, 1943, provides that from and after its "passage and approval . . . the office of the supervisor of registration of Putnam county, Florida, in the county court house at Palatka, Florida, shall be the sole and only place where those offering to register to vote at any general, special or primary election, may so register, and the registration books of said county shall at all times be kept at said place for such purpose." The act became a law without the governor's approval, but reasonably it would seem that "passage and approval," as used in section 1, did not condition the effectiveness of the act upon the governor's approval. Section 2 of the act repealed all laws and parts of laws in conflict therewith.

Section 98.22, Florida Statutes, 1941, as it existed at the time of passage of such act, among other things, prescribed the period of time when the general election registration books should be kept open in the election districts; and section 102.09, Florida Statutes, 1941, prescribed the period when the primary registration books should be kept open in the election districts. The last named section has not been amended, but section 98.22 was amended by chapter 24203, Laws of Florida, acts of 1947. However, under general rules of statutory construction it does not appear that the amendment of such general law disturbs the provisions of said chapter 22451; and, furthermore, the repealing clause of chapter 24203 affirmatively excepts a local law of the nature of chapter 22451.

In a recent opinion of this office, No. 048-47, I advised a supervisor of registration in a county wherein the places of registration were controlled by section 98.22, as amended, that the duty devolves upon such officer to register persons only in those places where under the law it is contemplated the books shall be kept. Chapter 22451 seems to fix the supervisor's office in the courthouse as the "sole and only place" where persons may be registered.

For the foregoing reasons, in my opinion the question is properly answered in the negative.

March 31, 1948.—048-116.

#### PLACE, TIME AND MANNER—REGISTRATION

**QUESTION:** May the registration officers in Hendry county register a person at a place other than the place where the law contemplates the registration books shall be kept open for registration?



*To Honorable A. O. Ward, Clewiston, Florida:*

Chapter 20491, Laws of Florida, 1941, providing for the registration of electors in Hendry county, Florida, among other things provides:

"The registration hereby provided for shall be at the time, in the manner, and at the place as is now provided by the general laws of the State of Florida relating to the registration of voters." In a recent opinion of this office, No. 048-47, I advised:

"Our general laws, which relate to registration in the primary and general election registration books, contain no provision for the registration of a person at a place other than the regularly designated places of registration. Sections 98.22, as amended, 102.09 and 102.17, Florida Statutes, 1941, prescribe the times the registration books are open in the hands of district registration officers and the supervisor of registration. The law would seem to contemplate that the books shall be open for registration either in the office of the supervisor or at such places in the respective districts as may be designated by the district officers in the posted notices required of such latter officers by section 98.22, as amended, and 102.09. On this point, see Application of Lennox, 201 N. Y. S. 326."

It is, therefore, my opinion that the registration officers may register persons only at those places where under the law it is contemplated the books shall be kept open for registration; that is to say, during the periods prescribed by our statutes in the office of the supervisor of registration or in the places in the election districts as the respective district officers shall designate as provided by general law.

The question is therefore answered in the negative.

September 8, 1947.—047-299.

#### DISTRICT REGISTRATION—LOCAL OPTION ELECTION—PASCO COUNTY

QUESTIONS: 1. In connection with reregistration of voters in Pasco county in pursuance of chapter 24260, Laws of Florida, acts of 1947, the supervisor of registration has sent the books to the district registration officers in the respective precincts for the registration of electors therein. How long should these registration books be left with the district registration officers?

2. Under the above mentioned act, is registration limited only to voters who have previously been registered in Pasco county, or may all persons otherwise qualified in Pasco county register in the new books regardless of whether or not they have previously been registered in said county?

3. In the event a wet and dry election is called for said county, will the voters who register in the new registration books be entitled to vote in said wet and dry election if such election is to be held prior to January 1, 1948?

4. If the answer to the preceding question is in the negative, in the event of such election, is the supervisor of registration authorized to open the old registration books in order that a person otherwise qualified who had not previously registered may register and be eligible to vote in said wet and dry election?

*To Mrs. Dove C. Falls, Supervisor of Registration, Pasco County, Dade City, Florida:*

In my opinion, the questions are properly answered in the numbered order, as follows:

(1) The authority for the sending of registration books to the respective district registration officers, for the purpose of such officers registering in said books electors residing in their said precincts, is determined by law. Section 4 of chapter 24260, Laws of Florida, acts of 1947, provides for the appointment by the supervisor of registration of said county of district registration officers in each of the said districts in such county, whose duty it shall be to attend to the registration of electors in their respective districts in substantial conformity with the provisions of general law applicable thereto and "in addition thereto such regional officers shall keep their books open for such time or times as shall be prescribed by the board of county commissioners of Pasco county, Florida." Under the general registration laws of Florida, there appears to be no authority at this time for such district registration officers to have possession of said books and to register people therein. Hence, it would appear that their authority to register people in such books at this time would have to depend upon action of the aforesaid board of county commissioners in pursuance of the above quoted provision found in section 4, chapter 24260, Laws of Florida, 1947, and the period during which they conduct said registration would be the period fixed by said board. Whether or not such quoted provision of section 4 constitutes an unwarranted delegation of power and could withstand test in an appropriate case is a question not here decided.

(2) Chapter 24260 contemplates the registration and reregistration of all persons in Pasco county who otherwise are qualified electors in said county, regardless of whether such persons hitherto have been duly registered or not.

(3) In the event a local option election is called in Pasco county and held prior to January 1, 1948, the qualification of electors to vote therein would depend upon the registration books heretofore used in said county and not the new registration books provided by chapter 24260.

(4) In the event any such election is held prior to January 1, 1948, the supervisor of registration would not be authorized to open the old registration books to permit persons otherwise qualified to register therein for the purposes of said election.

October 18, 1947.—047-349.

#### REGISTRATION—TIME FOR BOOKS TO OPEN—ALACHUA COUNTY

QUESTION: May the county commissioners of Alachua county, Florida, authorize the supervisor of registration of said county to begin registering electors in pursuance of the requirements of chapter 24242, Laws of Florida, acts of 1947, on January 1, 1948?

*To Miss Sue Simpson, Supervisor of Registration, Alachua County, Gainesville, Florida:*

Chapter 24242 provides that electors, before participating in or being qualified to vote in any general, special or primary election to be held in said county after the first day of May, 1948, are required to register in a new set of registration books. Section 2 of the act provides that registration in such new books shall be done at the times and places, and in the manner, provided by general law.

In view of the foregoing, the question is answered as follows:

Sections 102.09 and 102.17, Florida Statutes, 1941, fix the period for registering in the primary registration books, in election districts and in the office of the supervisor as in said laws provided, from the first Monday in February in primary election years to and including the third Saturday preceding the primary election. Section 98.22, Florida Statutes, 1941, as amended by chapter 24203, acts of 1947, provides that the general registration books shall be open for the period, either in the supervisor's office or with district registration officers as in said law provided, from the first

Monday in August in each year in which there is a general election to the thirtieth day preceding such general election. Hence, it appears that the county commissioners are not lawfully permitted to authorize the opening of such registration books in said county on January 1, 1948.

July 17, 1947.—047-204.

#### REGISTRATION—TIME FOR OPENING BOOKS—CITRUS COUNTY

QUESTION: Under the provisions of chapter 23712, Laws of Florida, acts of 1947, when should the registration books be opened for the reregistration of voters required by said law?

*To Honorable J. M. Hendrix, Supervisor of Registration, Citrus County, Inverness, Florida:*

The question is answered as follows:

Section 2 of said act provides, among other things, that the supervisor of registration of each county having a population of not less than 5400 nor more than 5450 is required in the year 1948 and in subsequent years to keep such new registration books open at all times, in the manner and at the places now provided by the general laws of this state relating to the registration of voters. Hence, it appears that the reregistration required by this law shall begin in 1948 at the time when, under the general laws, the registration books are required to be opened for the registration of voters.

November 24, 1947.—047-391.

#### REGISTRATION BOOKS—TIME FOR OPENING BOOKS—CITRUS COUNTY

QUESTIONS: 1. May the registration books for Citrus county, Florida, be opened on or prior to January 1, 1948, for the registration of persons to participate in the 1948 primary and general elections?

2. Whose duty is it to deliver the ballot boxes to the various election districts in Citrus county in connection with the primary and general elections?

*To Honorable J. M. Hendrix, Supervisor of Registration, Citrus County, Inverness, Florida:*

The questions are answered in their numbered order as follows:

(1) On July 17, 1947, in pursuance of request therefor, I advised in opinion No. 047-204 that under the provisions of chapter 23712, Laws of Florida, acts of 1947, it appeared that the reregistration of electors in Citrus county required by said act should begin in 1948 at the time when, under the general registration laws, the registration books are required to be opened. Chapter 23712 is a population act which applies at this time only to Citrus county. The request for opinion does not state whether the registration to which reference is made is to be done in pursuance of the provisions of chapter 23712 or under the general laws relating to registration, but the point is immaterial in view of the holding in my former opinion. In either event, the general registration laws relating to the opening of the registration books apply.

The registration books for the registration of electors for the 1948 primary elections in said county shall be opened on the first Monday in February, 1948, and not prior thereto. (Section 102.09, Florida Statutes, 1941.)

Registration books for the registration of electors for the 1948 general election in said county shall be opened on the first Monday in August,

1948, and not prior thereto. (Section 98.22, Florida Statutes, 1941, as amended.)

Thus it would seem that the registration of electors for said elections in Citrus county cannot begin on or prior to January 1, 1948.

(2) It appears that the provisions of section 99.02, Florida Statutes, 1941, relating to delivery of the ballot boxes to the several districts, apply to primary elections. (Section 102.55, Florida Statutes, 1941.) Said section 99.02, as amended, provides that the county commissioners, after preparation of each of the ballot boxes, as in said law provided, and after securely locking each box, sealing up the keyhole thereof and all other openings, "shall send the key thereof, in a sealed envelope, to the inspector of elections of said election district, together with the box." This would appear to cast the duty of delivering the ballot boxes to the several election districts upon the Board of County Commissioners.

August 27, 1947.—047-279.

#### REGISTRATION BOOKS—TIME FOR OPENING BOOKS—DESOTO COUNTY

QUESTION: May the registration books of DeSoto county, Florida, be opened at this time for the purpose of permitting the registration therein of persons who are otherwise qualified electors of said county?

*To Miss Sallie Ivey, Supervisor of Registration, DeSoto County, Arcadia, Florida:*

It is assumed that there is not now pending in DeSoto county any kind of special election which would authorize the opening of the registration books of that county for registration for such election. It is further assumed that registrations in DeSoto county are controlled by the general laws of Florida pertaining to registration, as distinguished from any local or population acts. This opinion is conditioned upon such two assumptions.

The time during which the primary registration books are open for registrations is fixed by sections 102.09 and 102.17, Florida Statutes, 1941, viz., from the first Monday in February to the third Saturday preceding the primary election in each primary election year. Said books are open in the supervisor's office and in the election districts in said county for the periods as in such laws provided.

The time during which the general election registration books are opened for registrations is fixed by section 98.22, Florida Statutes, 1941, as amended by chapter 24203, Laws of Florida, acts of 1947, viz., from the first Monday in August of each year in which there is a general election until the thirtieth day preceding the day of the general election. Said books are opened in the supervisor's office and in the election districts in said county for the periods as set forth in said section, as amended.

Registrations are not permitted except during the periods of time provided by law.

In view of the foregoing, in my opinion the question is answered as follows:

It does not appear that the registration books of DeSoto county may now be opened for the purpose of permitting the registration therein of persons who are otherwise qualified electors of said county.

July 29, 1948.—048-246.

#### REGISTRATION BOOKS CLOSING—SARASOTA COUNTY

QUESTION: Under the provisions of chapter 23708, Laws of Florida, acts of 1947, on what date do the registration books in Sarasota county close prior to the 1948 general election?



*To Evans and Glenn, Attorneys at Law, 708-12 Palmer National Bank Building, Sarasota, Florida:*

Chapter 23708 is a population act applicable to counties in the 19,000-19,250 bracket according to the 1945 census. Sarasota county alone falls within that population bracket. The question of the validity of such act is not within the province of this opinion; and for the purposes of this opinion chapter 23708 is assumed to be valid.

An examination of this act will disclose that its purpose was to provide a complete new registration of voters in counties having not less than 19,000 or not more than 19,250 population, according to the state census of 1945.

Section 1, provides the dates when the registration books shall be opened for this new registration; one provision being "said registration books shall then be opened in the office of the supervisor of registration on the first day of June and remain open through the third Saturday in October." This provision relates only to the year 1948.

Section 2, in part, provides "the registration books shall be opened in the office of the Supervisor of Registration of the County and remain open for registration at all times except thirty (30) days before elections when they shall remain closed until the day after election." This provision, seemingly in conflict with section 1, applies to the registration books subsequent to the general election in 1948.

My answer will, therefore, be that the supervisor of registration shall keep the books open through the third Saturday of October, 1948. Thereafter, the books shall be closed thirty days before elections and remain closed until the day after election.

March 6, 1948.—048-81.

#### ABSENTEE REGISTRATION

**QUESTION:** May the supervisor of registration of Seminole county lawfully register a federal employee now located in Washington, D. C., such person not having previously registered and not being personally present before such officer?

*To Mrs. Lourine A. Beal, Supervisor of Registration, Seminole County, Sanford, Florida:*

It would seem that such an applicant for registration must personally be present before the registration officer; hence, the question is answered in the negative.

March 2, 1948.—048-75.

#### REGISTRANT—PRESENCE BEFORE REGISTRAR NECESSARY

**QUESTION:** May a registration officer in Liberty county register a person who is not present before such officer?

*To Mrs. Eva Baker, Supervisor of Registration, Liberty County, Bristol, Florida:*

It is assumed that the registration of electors in Liberty county is governed by the general laws pertaining thereto; and this opinion is conditioned upon such assumption.

The request for opinion states that a person who registered and voted in Liberty county, subsequently thereto went to Tennessee, where he is now working; that in January, 1948, he was back in said county on vacation and desired to be registered so that he "could vote an absentee ticket;" that the supervisor of registration did not comply with this request because the registration books were not open. The supervisor wants to know if it would



be legal now to register this person. It is assumed that such person has returned to Tennessee.

The request for opinion is not construed as seeking advice concerning (1) whether this person is a legal resident of Liberty county and as such entitled to register, or (2) granted that Liberty county is still his legal residence, whether he can vote under his registration of two years ago. As is evidenced by the question, such matters are not dealt with in this opinion. Since the request for opinion relates this person's expressed desire to vote an absent ballot, it is remarked that such a ballot cannot be voted outside of Florida. See chapter 101, Florida Statutes, 1941.

In my opinion, the question is properly answered as follows:

It is lawful to register a person only during the period the registration books are open (State ex rel Martin vs. Sumter County Commissioners, 20 Fla. 859). An applicant for registration must be personally present before the registration officer at the time he is registered, except possibly in those instances under the circumstances found in sections 102.14-102.15, Florida Statutes, 1941, which circumstances are not found in Liberty county. Hence, it would seem that an applicant for registration contemplated by the question must be personally present before the registration officer at the time of his registration.

February 20, 1948.—048-66.

#### REGISTRATION—RESIDENCE—ABSENCE FROM COUNTY

**QUESTION:** A man registered in the registration books of Madison county for the 1946 elections and voted in such county at that time. Subsequently thereto, he moved to south Florida, and was away from the county for fifteen months, during which time he remained on the registration books as a qualified voter of the county. In January, 1948, he moved back to the county. A reregistration of electors is being made in the county. May this man now be registered as an elector of Madison county?

*To Honorable A. E. Ragans, Supervisor of Registration, Madison County, Madison, Florida:*

The residence requirement of an elector, as stated in article VI, section 1, Florida Constitution, and section 98.01, Florida Statutes, 1941, is that the person shall at the time of registration be a citizen of the United States, and shall have resided and had his habitation, domicile, home, and place of permanent abode in Florida for one year, and in the county for six months. When question arises concerning the matter of residence, it is a mixed one of fact and law, and there is required to be considered all detailed circumstances related to the question; and when issue is seriously joined on the question, only the courts can definitely adjudicate it. Yet there is here presented a duty to be performed by the supervisor of registration, and he must exercise his judgment.

In addition to other possible statements required to be made under oath by an applicant for registration, the applicant must take the oath required by article VI, section 3, Florida Constitution (see sections 98.11 and 102.19, Florida Statutes, 1941). It will be noted that the applicant by such oath asserts thereby that he possesses those qualifications for voting prescribed by article VI, section 1, Florida Constitution.

If during the period of time this man was absent from Madison county it was never his intention to move his legal residence from that county, and if his residence elsewhere in this state was temporary and was so considered by him, and if during such absence he did not register and/or vote in any elections, municipal or otherwise, outside said county, then under the general rule it would seem that he may be registered in Madison county at this time.

In view of the foregoing, it appears that the question is properly answered as follows:

If this person makes application to register in Madison county, and makes the oaths required by law in connection therewith, he should be registered, subject to the exception in the succeeding sentence. In the light of what has been stated in this opinion, if upon interrogation by the supervisor of registration that officer should determine in his judgment that this person abandoned Madison county as his place of legal residence during his absence therefrom, as aforesaid, then such officer may properly refuse to permit the registration of said person.

January 13, 1948.—048-10.

#### CHANGE OF PRECINCTS—DUTY OF COUNTY COMMISSIONERS

**QUESTION:** As a result of the redistricting of Dixie county into county commissioners' districts in September, 1947, soon thereafter, in October, 1947, changes were made with respect to some of the election districts in said county; the number of such election districts were increased from nine to twelve, and a certain number of the election districts as changed embrace a part of the territory in justice of the peace districts numbered 1 and 2 in said county. Said justice districts, the combined areas of which embrace the county, were created in 1932, existed as such at the time of the adoption of amended article V, section 21, Florida Constitution, and have remained unchanged to this date. In such election districts lying partly in both said justice districts, could an election properly be held for the nomination in the primary or election in the general election of a candidate for the office of justice of the peace or constable of either of said justice districts?

*To Honorable Cauley C. Copeland, Clerk of Circuit Court, Dixie County, Cross City, Florida:*

It is assumed that the redistricting of the county into county commissioners' districts, in pursuance of writ of mandamus, as stated in the request for opinion, was in conformity with amended article VIII, section 5, Florida Constitution, and certain of the provisions of chapter 124, Florida Statutes, 1941, as revised and amended by chapter 24108, Laws of Florida, acts of 1947. It is further assumed that the necessity, mentioned in the request for opinion, for alteration and change of election districts and creation of new ones was to place each election district wholly within one of the county commissioners' districts, and this was proper. See section 124.04 of said amended chapter 124.

Our supreme court has not as yet finally construed the effect of article V, section 21, Florida Constitution (see case of *Wilson, etc. vs. Crews, etc.*, in said court; opinion filed August 1, 1947; rehearing granted and now pending). In the absence thereof, it appears that caution dictates the construction that with the adoption of said amendment, the power to alter or change justice districts existing at the time of the adoption of such amendment in 1944, or to create new ones, was lodged in the Legislature, subject to ratification by those in affected areas, as in said amended section provided. Accepting this construction, it would seem that the provisions of sections 37.04-37.07, Florida Statutes, 1941, which granted powers to county commissioners concerning justice districts, must yield to said constitutional provision.

It is noted that said section 37.04 provided with respect to establishment of a justice district that it should be done so that "as near as practicable the limits of said district shall be coextensive with the limits of one or more election districts." Whether such provision, in view of said amended article V, section 21, is still in effect, I do not here attempt to decide. Hitherto our supreme court, without elaboration, mentioned such quoted provision in *Conyers vs. State*, 98 Fla. 417, 123 So. 817. The foregoing question is con-

cerned with the mechanics of elections. Considering the legal functions of an election board, that there is one voting place and one election board in an election district, and the nature of the information concerning registrants required to be set forth in primary and general election registration books under the general law and thus available to an election board, there appears to be a practical aspect which presents formidable argument which will preclude any election district being so established so as to lie in two justice districts.

In view of the foregoing, in my opinion the question is answered as follows:

In changing the election districts and in the creation of new ones, as aforesaid, by the county officials in Dixie county, the duty devolved upon such officials to arrange such election districts so that each of such districts would be entirely in one or the other of such justice districts; and, hence, the above question is answered in the negative. It is remarked that the duty to so conform such election districts is a continuing one and, in view of the approaching primaries and the 1948 general election, a matter of urgency at this time. On the subject of change of election districts, see section 98.23, Florida Statutes, 1941, as amended by chapter 24203, Laws of Florida, acts of 1947.

January 13, 1948.—048-26.

#### REQUIRED RESIDENCE—REGISTRATION—NEW PRECINCT

QUESTION: In October, 1947, the county officials of Dixie county made certain changes and alterations in election districts and created new ones, increasing the number thereof from nine to twelve, in consequence of a redistricting of such county, into new county commissioners' districts. Chapter 23855, Laws of Florida, acts of 1947, requires a reregistration in said county. In view of the foregoing:

1. May a person in Dixie county who was registered in old election district No. 6, and who moved therefrom with his family ten months ago into, and continues to reside in, the territory now comprising new district No. 8, now register in new district No. 11 (formerly old election district No. 6), or must such person register in new election district No. 8?
2. May a person in Dixie county who is now residing and has resided, together with his family, in county commissioners' district No. 4 for the past ten months, qualify as a candidate in the 1948 democratic primaries for nomination for the office of county commissioner for county commissioners' district No. 5 of said county?

*To Mrs. Jessie Williams, Supervisor of Registration, Dixie County, Cross City, Florida:*

The second question has to do with the qualifications of a candidate. This office is limited in advice and opinions to heads of departments, boards and commissions, and officers of the state concerning official duties. It is not apparent that the matter set forth in the second question is related to the duties of the officer requesting this opinion; and in view of the foregoing, such officer will understand why no attempt is made to answer it. The remainder of this opinion deals with the first question.

It is noted that under the provisions of chapter 23855, Laws of Florida, acts of 1947, a new registration is required in Dixie county to qualify for voting in primaries and general elections held in 1948 and thereafter. There appears to be no reason here for inquiry into the validity of such act.

The general laws of Florida, which relate to registration, contemplate that an elector shall be registered in the election district where he resides. He is not permitted to vote in any other election district than the one in which he is registered (section 98.32, Florida Statutes, 1941). If he moves his residence from one election district to another, within the time per-

mitted by law he may apply to the registration officer for a certificate of registration in accordance with such change of residence; and unless he has such transfer of registration, he shall not be allowed to vote (section 98.39, Florida Statutes, 1941, as amended). It is recognized that there is to be a reregistration in Dixie county this year in pursuance of said chapter 23855; but sections 98.32 and 98.39 are mentioned as evidencing the importance of being registered in the election district of residence.

"Residence" and "reside," as used in the foregoing, contemplate the "habitation, domicile, home and place of permanent abode," as such words are used in the qualifications of electors in article VI, section 1, Florida Constitution, and section 98.01, Florida Statutes, 1941. While the word "home," with its usual implications to the understanding of the average person ordinarily conveys the meaning of the foregoing words quoted from our constitution and laws, the question of legal residence is a mixed one of fact and law, depending upon the circumstances of the individual case. If the facts contained in the request for opinion are to be accepted as indicating that the person contemplated by the question ten months ago established his permanent, as distinguished from temporary, home in what is now new election district No. 8, and continues to reside there, he should register in said election district No. 8.

January 20, 1948.—048-25.

#### REREGISTRATION—CHANGE OF PRECINCTS—DUTY OF SUPERVISOR

**QUESTION:** As a result of recent action of county officials in Hendry county, the territory formerly in district No. 1 is now embraced in new election districts numbered 1 and 7. Due to such change, is a reregistration of voters living in said new election districts, or either of them, authorized or required?

*To Honorable R. A. Gray, Secretary of State:*

The request for opinion states that the supervisor of registration of said county has advised that he knows the only way he "can get a record of Number 7 is for them to reregister," and that he would also like a reregistration in election district No. 1.

Registration is one of the qualifications for voting prescribed not only by our statute (section 98.01, Florida Statutes, 1941), but by our constitution (article VI, section 1); and the manner of registration as fixed by our laws is in pursuance of section 2 of said article VI. A person cannot be deprived of his vote because of the wrongful removal of his name from the registration books (*State vs. Jefferson County*, 17 Fla. 707). A registration of voters made in a manner other than that prescribed by statute is illegal (*State vs. Sumter County Commissioners*, 20 Fla. 859).

It appears that the general laws relating to registration are applicable in Hendry county. There seems to be no law authorizing a reregistration in said county. The provisions of our laws which contemplate that a registrant shall vote in the district where registered and that he shall be registered in the district where he resides (sections 98.32 and 102.10, Florida Statutes, 1941), and providing for certificate of transfer when a person moves from one district to another (section 98.39, Florida Statutes, 1941), may not be urged as against a registrant who finds himself in a differently described and numbered district as result of alteration of districts by county authorities. In my judgment, change of election districts by proper authorities does not annul the registration of registered electors who find themselves in differently numbered and described districts as result of such change. Any rule of law applicable to such a situation of necessity must be constant; reregistration is either required or not required under such circumstances; and there appears to be no law which permits and requires it.

It is contemplated that registration books shall be kept in such manner as to indicate with reasonable certainty the address of registrants (sections



98.28 and 102.21, Florida Statutes, 1941). It is assumed that the registration books of said county have been so kept. The boundaries of new election districts numbered 1 and 7 have, doubtless, been defined with certainty. It would seem, therefore, that from these sources the supervisor could at this time ascertain with respect to most of the affected registrants the new districts in which they now reside. If doubt exists as to any registrant in this connection, inquiry on the part of the supervisor should remove the difficulty.

In view of the foregoing, in my opinion the question is properly answered as follows:

In preparing the registration books for both the primary and general election, the supervisor of registration should, in preparation of the books for the two districts created from a single district, transfer to such books the names of those qualified electors duly registered in the old district, according to the respective places of residence of said electors in such new district. To the same effect see my opinion No. 046-355, Biennial Report of Attorney General, 1945-1946, page 191. Hence, it appears that the question must be answered in the negative.

October 13, 1947.—047-341.

#### SUPERVISOR OF REGISTRATION—ELIGIBILITY OF SUPERVISOR

QUESTION: Has there been any repeal of amendment to section 98.16, Florida Statutes, 1941, since the rendition by this office of opinion No. 041-593, dated October 21, 1941, Biennial Report of Attorney General, 1941-1942, page 86?

*To Honorable Ben. L. Davis, Supervisor of Registration, Escambia County, Pensacola, Florida:*

Above section 98.16 provides that the supervisor of registration shall not be eligible for any other office until six months after ceasing to be such supervisor. Said opinion No. 041-593 dealt with the application of such law to the factual situation set forth in the opinion.

There appears to have been no repeal or amendment of said section 98.16 since the date of the aforesaid opinion.

December 17, 1947.—047-435.

#### COMPENSATION OF SUPERVISOR—SUPERVISOR OF REGISTRATION

QUESTIONS: 1. In view of the provisions of section 98.17, Florida Statutes, 1941, chapters 24019 and 24058, Laws of Florida, acts of 1947, who is responsible in Okaloosa county for fixing the amount and paying the compensation of district registration officers?

2. May any sums be paid upon the compensation of a supervisor of registration and district registration officers in said county when no amount is provided in the current budget for such purposes?

*To Honorable G. F. Kirkland, Supervisor of Registration, Okaloosa County, Crestview, Florida:*

The request for opinion refers to the additional compensation to the supervisor of registration provided by section 2 of chapter 24019, and sets forth that the county commissioners have stated that the supervisor must pay the district registration officers out of his compensation and, further, that while the county budget provides \$2,000 for election expenses, no amount was budgeted for the expense of registration.

Chapter 24019 applies to counties in the 16,000-16,200 bracket according to the 1945 state census; it requires a reregistration of electors as a prerequisite to their participation in elections after January 1, 1948; and



section 2 thereof, provides that the Board of County Commissioners of such counties shall fix and cause to be paid to the supervisor additional compensation not in excess of \$400 for added labor expense and clerical help incident to such reregistration. The act provided that it should take effect upon becoming a law. Chapter 24058 applies to counties in the 16,100-16,200 bracket according to the last state census; provides annual salary of \$900 for the supervisor payable in equal monthly instalments, and became effective October 1, 1947. Both acts became laws without the governor's approval and were filed in the office of the secretary of state on June 16, 1947; and it would appear that neither conflicts with the other.

Okaloosa county, according to the 1945 state census, is the only county falling within the population brackets of these two acts. While grave doubt exists that these acts could withstand a court test of their validity, it is not the province of this office, under the circumstances found here, to attempt to adjudicate that question. Hence, such acts are here assumed to be valid, and this opinion is conditioned upon that assumption.

Neither of these acts deals with the compensation of district registration officers. Their compensation is payable by the county after it is fixed by the Board of County Commissioners (section 98.17, Florida Statutes, 1941). The board's discretion to fix such compensation is not unlimited, the statute contemplating that reasonable compensation commensurate with services rendered shall be adjudged and paid. Registration of electors is an essential of the election processes, provided by our constitution (article VI, sections 1, 2). If payment of compensation of the supervisor and district registration officers should depend upon county budget provisions, conceivably this constitutional prerequisite for voting could seriously be interfered with by inadequacy of a county budget; and such a contingency is not to be countenanced.

It would seem that the compensation of the supervisor and district registration officers is payable from the general fund of the county; that chapter 24058 is a legislative appropriation for the payment of the supervisor's annual salary; that section 2 of chapter 24019 is a legislative appropriation of a sum not to exceed \$400 for additional compensation for the supervisor when same has been fixed by the board; that pertinent provisions of section 98.17 constitute a legislative appropriation for the payment of compensation of district registration officers when the board has fixed such compensation. Hence, it would seem that failure to provide for such items in the county budget does not for that reason necessarily preclude payment of the same. (See Cary, et al. vs. State ex rel Howell, 141 Fla. 866, 194 So. 213.)

In view of the foregoing, in my opinion the questions are answered in their numbered order as follows:

(1) The compensation of such district registration officers is to be fixed and is payable by the Board of County Commissioners of said county, after the supervisor of registration shall have certified the amount of service performed by them. Since the supervisor is not responsible for the compensation of district registration officers, it would reasonably appear that the additional compensation not in excess of \$400 provided by section 2 of chapter 24019 is not applicable and has no relation to the compensation of such district registration officers.

(2) The compensation of the supervisor of registration, the compensation of district registration officers when fixed by the board, and such additional compensation not in excess of \$400 to the supervisor which may be fixed by the board, should be paid by the board out of the general fund of the county, even though the county budget made no provision for payment of the same.

November 13, 1947.—047-385.

EFFECT OF LOCAL LAW—SUPERVISOR OF REGISTRATION—  
PALM BEACH COUNTY

**QUESTION:** Is the supervisor of registration in Palm Beach county governed by the provisions of chapter 23741 or chapter 23903, Laws of Florida, acts of 1947, with respect to the registration of electors in said county?

*To Honorable R. A. Gray, Secretary of State:*

Chapter 23741 is a comprehensive registration act for Palm Beach county, providing a permanent registration system for said county. It appears from an examination of the records of your office that notice of intention to apply for such legislation was given. The act became a law without the governor's approval, and was filed in the office of the secretary of state on May 22, 1947. Section 19 of the act provides that it shall take effect immediately upon becoming a law.

Chapter 23903 provides comprehensively for a permanent registration system for counties in the state of more than 100,000 and less than 130,000, according to the last state census. The 1945 state census gave Palm Beach county a population of 112,311. According to the records of your office, no notice of intention to apply for passage of such act was given. It became a law without the governor's approval and was filed in the office of the secretary of state on June 3, 1947. Section 17 of the act provides that it shall take effect immediately upon becoming a law.

No attempt is made here to give an opinion on whether a registration act applicable to one or three counties of the state is valid in view of article III, section 20, Florida Constitution, or whether chapter 23903, applicable to three counties of the state, is a local act and invalid because no notice was given as required by article III, section 21, Florida Constitution. This opinion is conditioned upon such acts being valid acts.

Section 15 of chapter 23903 provides in effect that all laws or parts of laws, general, local or special, insofar as they are in conflict or inconsistent with the provisions of chapter 23903 are repealed.

Section 10 of chapter 23741 provides for certain compensation and expenses for the supervisor; and section 11 of the act provides for the compensation of the chief deputy supervisor of registration. Chapter 23903 does not deal with such subject matters.

Section 15 of chapter 23741 provides that the new registration authorized and provided by the act shall become effective on January 1, 1948. Section 13 of chapter 23903 has the same provision, but conditioned as follows: "except that any county affected by this act in which a county-wide registration has been had since January 1, 1946, shall not be required to operate under the provisions of this act until January 1, 1950, at which time all registrations under any previous act or acts shall become null and void and shall have no further legal force or effect in enabling any person to vote in any state or county election held in all counties affected by this act." It would appear that "county-wide registration" as used in such quoted provision is intended to mean a county-wide reregistration.

In view of the foregoing, in my opinion the question is answered as follows:

(1) In the absence of a court adjudication as remarked below, the supervisor of registration of Palm Beach county shall be controlled and governed by the provisions of chapter 23903 in connection with the registration of electors in said county, as provided in said act, and to the extent of its provisions.

(2) Chapter 23903 does not deal with the compensation of the supervisor of registration or the chief deputy supervisor of registration of said

county; hence, it would appear that sections 10 and 11 of chapter 23741 are not repealed or in any way disturbed by chapter 23903, and said sections 10 and 11 are in force and effect.

(3) While no attempt is made here to give an opinion on the point, a casual comparison of the provisions of chapter 23741 and 23903 would seem to indicate that if, in any proceedings properly brought, chapter 23903 were adjudicated invalid as a local act, and chapter 23741 were left standing, following the provisions of 23903, as above indicated, would do no violence to or be inconsistent with similar provisions of chapter 23741.

(4) It is remarked that the question of the validity and priority of the provisions of these acts could be settled definitely in a declaratory judgment proceeding properly instituted and conducted.

September 8, 1947.—047-300.

#### REREGISTRATION—EFFECTIVE TIME FOR VOTING—PASCO COUNTY

**QUESTION:** In the event a local option election is held in pursuance of law in Pasco county, Florida, prior to January 1, 1948, should the registration books now being used to register and reregister electors under chapter 24260, Laws of Florida, acts of 1947, or the old registration books of said county, be used to determine who are electors qualified to participate in such election?

*To Honorable A. J. Burnside, Clerk, Circuit Court, Dade City, Florida:*

Chapter 24260, Laws of Florida, acts of 1947, authorizes and directs the reregistration of all voters in said county who intend to qualify for voting in any primary, general or special election to be held in the year 1948 and subsequent years. While the act authorizes any person who possesses the qualifications required by law to become a registered voter to register or reregister now in the new books contemplated by the act, the new registration or reregistration for the purposes of voting does not become effective until January 1, 1948.

In view of the foregoing, in my opinion, the question is properly answered as follows:

If any such election is held prior to January 1, 1948, only those who, according to the old registration books, are duly registered electors in said county may participate in said election.

In view of the foregoing answer, it is considered proper to call attention to a certain factor in the event such a local option election is held prior to January 1, 1948. While the law relating to local option elections prescribes that for such an election, electors may be registered as provided in the general law for registration for special elections, we heretofore have held that there is no provision in the general registration laws for the opening of books for registration for "special elections." It may be that, this fact being known, those interested in calling such election might desire to defer action with respect thereto until after January 1, 1948, so that all persons otherwise qualified will have had opportunity to register and be entitled to vote in such an election.

September 23, 1948.—048-310.

#### DISHONORABLE DISCHARGE—EFFECT UPON CIVIL RIGHTS

**QUESTION:** Are the civil rights of a veteran affected by a dishonorable discharge from the Armed Forces of the United States?

*To Mr. S. A. Graves, County Service Officer, Bartow, Florida:*

I find no statute of this state providing that a dishonorably discharged veteran loses his civil rights by virtue of such dishonorable discharge.

Since the request for opinion was evidently evoked by a situation involving the right of a dishonorably discharged veteran to vote, I have given consideration to the provisions of the Florida Constitution and statutes prescribing the qualifications of an elector in the State of Florida. There appears to be nothing in section 98.01, Florida Statutes, 1941, or sections 4 and 5 of article VI, Florida Constitution, which may be construed as including a dishonorable discharge among those enumerated things which occasion loss of franchise.

It should be pointed out, however, that if the dishonorable discharge of such veteran was predicated on a conviction by a court-martial of desertion during time of war, or a conviction for committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, then, in accordance with the provisions of section 801, Title 8, U.S.C.A., such veteran would not be qualified to vote in this state, since by any such conviction, he would lose his citizenship.

It should also be pointed out that if the dishonorable discharge of such veteran was predicated on a conviction of a felony in any court of record, or a conviction of any offense enumerated in said section 98.01 in a court of this state, or any other state (including a federal court), such veteran is not qualified to vote. However, it is my opinion that a conviction by a court-martial, alone, of any offense enumerated in section 98.01, supra, would not disqualify such veteran.

As thus qualified, the question is answered in the negative.

October 27, 1948.—048-335.

#### BLANK REGISTRATION CERTIFICATES—DUTY OF SECRETARY OF STATE

**QUESTION:** Under the provisions of section 8, chapter 24216, Laws of Florida, acts of 1947, properly, may the office of the secretary of state be called upon to reimburse the Board of County Commissioners of Broward County for the sum of \$181.50 expended by them for 35,000 blank certificates of registration?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 24216 established a permanent registration system for Broward county, the effective date of registration in pursuance of such system being December 1, 1947. Section 8 of the act provides for the issuance to each registrant of a certificate of registration and further provides that, "It shall be the duty of the Secretary of State to furnish to the supervisor of registration sufficient blank registration certificates to provide for the registration of all persons qualified to register hereunder."

Under section 98.29, Florida Statutes, 1941, the secretary of state is required to furnish to those counties operating under the general laws pertaining to registration, books and blanks for registration purposes as set forth in said section. Thus, it would seem that no uncertainty exists as to this duty on the part of the secretary of state with respect to those counties operating under the general law. Special or population acts of the Legislature which have been passed pertaining to one or a limited number of counties in Florida have not been uniform in their requirements with respect to this feature, some providing that the cost of such books and records shall be borne by the county and others similar to the Broward county act under consideration.

From the information available in the request for opinion and enclosures, it appears that the secretary of state is not called upon to furnish blank registration certificates but to reimburse the county commissioners of Broward county for a sum of money expended by such officials there for certificates to be used under the aforesaid system.



In view of the foregoing, in my opinion the question is properly answered as follows:

The quoted portion of section 8, chapter 24216, reasonably contemplates that upon request therefor, the secretary of state shall have printed and furnished to the supervisor of registration of Broward county the blank registration certificates required. In other words, the expense for the printing of such certificates should not have been incurred by local Broward county authorities except in pursuance of direct authority of the secretary of state with respect thereto. However, since the item of \$181.50 for the 35,000 registration certificates has been approved by the secretary of state for payment, it is assumed that such officer has inquired into the reasonableness of the statement for the work done and has satisfied himself that the amount required for such printing is fair and reasonable. Hence, in view of the particular circumstances found here, it is recommended that the comptroller issue warrant covering the item approved in the requisition of the secretary of state.

It is remarked that some question might be raised as to the sufficiency of the title of chapter 24216, concerning the several requirements in the act that the secretary of state shall furnish certain of the records and blanks contemplated by the system. However, it is not the province of this office to go into that question. Furthermore, attention is directed to the fact that under the general law, registration records are required to be furnished by the secretary of state.

This opinion is not to be construed as passing otherwise upon the validity of section 8 of chapter 24216 or any other feature of the act, and is applicable only to the particular question involving the circumstances found here in connection with such item of expense.

September 14, 1948.—048-299.

#### REGISTRATION—SPECIAL PRIMARY

**QUESTION:** Are persons who have registered in the registration books of Liberty county since the 1948 primaries qualified to vote in a special primary to be held in said county on September 21, 1948?

*To Mrs. Eva Baker, Supervisor of Registration, Liberty County, Bristol, Florida:*

It seems the special primary is required to nominate a person for the office of superintendent of public instruction of said county.

Chapter 22717, Laws of Florida, acts of 1945, provides for the biennial registration of electors in said county. For the purposes of this opinion I assume that such act is valid and I shall make no inquiry into that question.

Section 1 of said act provides, in part, that in 1946 and each two years thereafter, "the registration books shall be opened in the precincts on the first Monday of February and shall be closed in the precincts on the last day of February in said years; that they shall be opened for registration in the office of the supervisor of registration on the first day of March and be closed on the last day of March for said years for registration for primary elections; that they shall be opened on the first day of June following the primary and remain open in the office of the supervisor of registration until the second Saturday preceding the general election in each year beginning with the year 1946."

Section 2 of the act provides that, "the said registration books shall be in the form now required by the general laws of the State of Florida." Under the provisions of this section, since the general laws require primary election registration books, such would seem to be required for Liberty county.



The provision in section 1 providing for opening of the registration books in February and March biennially "for registrations for primary elections," reasonably refers to the primary registration books as distinguished from the general election registration books. The further wording quoted from section 1 that, "they shall be opened on the first day of June following the primary and remain open, etc.," is not clear as to meaning. The word "they" certainly includes the general election registration books; but such word "they," without qualification, reasonably refers to the registration books of said county, which are comprised of both primary and general election registration books. In the absence of a court adjudication defining such word "they" as so used, it would seem reasonable to conclude that the word includes both the primary and general election registration books.

In view of the foregoing, in my opinion those persons who have registered in the primary registration books in Liberty county since the 1948 primary elections and who are otherwise qualified electors of said county, are qualified to vote in the special primary election to be held in said county on September 21, 1948, as described.

### HOLDING ELECTIONS AND ASCERTAINING THE RESULTS

November 28, 1947.—047-386.

#### POLLING PLACES—NUMBER OF BOXES—RACIAL SEGREGATION

QUESTION: Under the laws of the State of Florida, may there be provided more than one polling place and more than one ballot box and more than one group of election officials in each election precinct or district; that is to say, a polling place for voting by negro electors and a polling place for voting by all other electors?

*To Honorable John H. Treadwell, Jr., County Attorney, DeSoto County, Arcadia, Florida:*

Section 99.02, Florida Statutes, 1941, as amended, provides that the "county commissioners . . . shall cause to be prepared or secured one ballot box for each polling place in their respective counties of sufficient size to receive and contain all the ballots of the particular precinct or voting place for which it is intended;" section 99.06, Florida Statutes, 1941, provides that "there shall be in each and every election district . . . one polling place;" section 99.01, Florida Statutes, 1941, provides election officials "for each polling place in each and every election district;" and section 99.04, Florida Statutes, 1941, relates to the compensation of "inspectors, and clerks . . . serving at the respective polling places in the various election districts."

It is my opinion that when these statutes are construed, the Legislature intended under normal conditions that there should be only one ballot box and one polling place and one group of election officials in each precinct or district.

Should an occasion arise when one ballot box would be insufficient to take care of the ballots at such voting place, and bearing in mind that it is the purpose of our law to encourage voting and to preserve the purity of the ballot, the election officials would have the right, and it would be their duty to provide, sufficient receptacles for the ballots in order that no elector would be denied his political and constitutional right to vote (see *State Board of Election Officials vs. Coleman*, 35 Ky. 24, 29 S. W. 2d 619, text 624). This is only in case of one ballot box being insufficient to hold the ballots and is not to be construed as permitting more than one ballot box in one polling place in order to segregate the votes of the electors.

It is also my opinion that the one polling place in the said precinct could, without doing violence to the intention of the Legislature, be so arranged that there could be two entrances to the polling place, one for

negro electors and one for other electors, so that there would be no intermingling of the races.

I see no reason why such polling place could not be arranged so as to be taken care of adequately by one group of election officials.

April 26, 1948.—048-135.

#### INSPECTORS, CLERKS—NUMBER—POLLING PLACE

QUESTION: How many inspectors and clerks may be employed in precincts of Okaloosa county in order to expedite voting on May 4?

*To Honorable Walter Spencer, County Commissioner, Okaloosa County, Niceville, Florida:*

"Retel. It appears that only three inspectors and one clerk are permitted to be appointed for each polling place in your county. See section 99.03, Florida Statutes, '941.

June 18, 1948.—048-204.

#### STICKERS—WRITE-IN VOTING—RUBBER STAMP

QUESTIONS: 1. May a sticker with the name of a person printed thereon be used by a voter for filling in the name of such person as the candidate of his choice for a particular office in the blank space provided on the general election ballot?

2. May a rubber stamp be used by a voter for filling in the name of the candidate of his choice for a particular office in the blank space provided on the general election ballot?

*To Honorable R. A. Gray, Secretary of State:*

The foregoing questions are answered in their numbered order as follows:

(1) In opinion No. 046-435 (Biennial Report of Attorney General, 1945-1946, page 173) it was held that in view of the wording and apparent intent of section 99.29, Florida Statutes, 1941, there appeared to be no objection to the use of stickers for voting as contemplated by the first question; but it was further held in said opinion that such stickers may not be distributed at the polls for such use. It was noted in that opinion that if a sticker is so used as contemplated by the first question, after the stickers are fixed on the blank line, to constitute a vote for the candidate whose name is on the sticker, the voter must "mark the cross mark (X) in the appropriate margin" on the ballot. It is remarked that in assuming this position due notice has been given to the provisions of section 99.34, Florida Statutes, 1941, and reasonably it would appear that the use of stickers as herein set forth does not violate the provisions of said section noted in succeeding paragraph (2). Hence, this question is answered in the affirmative.

(2) A part of said section 99.34 is quoted as follows:

"Any elector who shall, except as provided by law, . . . take into the election booth any mechanical device, ticket or memorandum; printed or written, other than the official ballot or ticket, to enable him to mark said ballot or ticket . . . shall be fined not less than \$10.00 or more than \$100.00, or be imprisoned not more than three months."

It appears that use of a rubber stamp for the purpose contemplated by this question would constitute the use of a mechanical device within the prohibition noted in the foregoing quoted portion of section 99.34. Hence, it would seem that a rubber stamp may not be used for the purpose of "fill-in" voting as contemplated by this question; and that the question is therefore answered in the negative.

August 22, 1948.—048-275.

VOTING FOR ONE OR MORE PRESIDENTIAL ELECTORS—  
STRAIGHT PARTY TICKET

QUESTION: In the event a voter desires to vote for four presidential electors appearing in the democratic column on the ballot to be used in the coming general election and does not desire to write in the ballot any additional names or vote for any other presidential electors appearing on the ballot, would such a ballot be a legal one?

*To Honorable Charles E. Shepperd, St. Augustine, Florida:*

It is my opinion that such a ballot would be legal and should be counted. An elector voting in the general election for presidential electors may vote for one or more of such presidential electors but not for more than eight. Attention is called to the fact that should an elector vote a straight party ticket, such would include the eight candidates for presidential electors of his party appearing on the ballot; hence, a write-in vote for such a candidate thereafter would vitiate the vote for all such candidates.

July 8, 1948.—048-229.

NOMINEE MARRIES—GENERAL ELECTION BALLOT—PRINTED  
NAME

QUESTION: A female party nominee for a county office in the 1948 primaries has married since nomination. How should such nominee's name appear upon the general election ballot?

*To Mrs. V. C. Messenger, Supervisor of Registration, Seminole County, Sanford, Florida:*

The correct rule would seem to be that a married woman's legal name is her own Christian name and her husband's surname. (45 C. J. 368, section 5; 38 Am. Jur. 600, section 10; Annotations: 35 A. L. R. 417-419.) Hence, it would appear that if a woman by the name of Mary Smith was nominated for a county office in the 1948 primaries, and since then has married a man by the name of Jones, her name as such party nominee may properly appear on the general election ballot as Mary Jones. It is further remarked that apparently no harm would be occasioned if her name appeared on such ballot as Mary Smith Jones, whether the name "Smith" was her maiden surname or the surname of a former husband.

March 22, 1948.—048-103.

REFERENDUM ELECTION—DATE OF PRIMARIES

QUESTION: If the special election provided by house bill No. 825, enacted during the 1947 session of the Legislature, is held on May 4, 1948, the date of the first primary election, will it be necessary for the county commissioners to appoint separate officials and furnish ballot boxes for such special election?

*To Honorable Lloyd M. Hicks, Clerk, Circuit Court, Bradenton, Florida:*

I find no provisions under the laws of the State of Florida prohibiting the use in such election of the election officials appointed for the primary election. It is, therefore, my opinion that the same officials may be appointed by the county commissioners to preside at the polls in both elections, provided separate ballots and ballot boxes are furnished for the special election under house bill No. 825. Separate appointment of such officials should be made as to the special election and they should subscribe to a separate oath or affirmation as to each election with respect to their duties to be performed as prescribed by law.

April 6, 1948.—048-119.

#### MOSQUITO CONTROL DISTRICT—GENERAL ELECTION

QUESTIONS: 1. In the election provided for in house bill No. 1280 to be held at a general election in Manatee county, will it be legal to use the same election officials as used in such general election?

2. Will it be legal for the county commissioners of Manatee county to print on the ballot to be used in the general election the question of establishment of Manatee county as a mosquito control district?

*To Honorable Walter S. Hardin, Representative, Manatee County, Bradenton, Florida:*

House bill No. 1280 provides for an election to be held in Manatee county. The qualified electors of said county are to determine whether or not such county shall become an anti-mosquito district as set forth in said bill. Section 2 of said bill provides that if the report of the State Board of Health required therein is received by the Board of County Commissioners of Manatee County in session "at least thirty days prior to a General Election," it shall then be the duty of the board to call such election to be held at such general election. I fail to find any provision in the laws of the State of Florida or in the Constitution of the State of Florida prohibiting the holding of such election on the same date as the date set for a general election, nor do I find any provision prohibiting the use of the same election officials. It is, therefore, my opinion that the same officials may be used by the county commissioners to preside at the polls in both elections, provided separate ballots and ballot boxes are furnished for the election under house bill No. 1280. Separate appointment of such officials should be made as to the special election and they should subscribe to a separate oath or affirmation as to each election with respect to their duties to be performed as prescribed by law.

April 12, 1948.—048-124.

#### COUNTY CANVASSING BOARD—SERVICES—GRATUITOUS

QUESTION: Is the county canvassing board entitled to any compensation for their services in canvassing the votes in an election?

*To Honorable Tom Harrell, Supervisor of Registration, Sopchoppy, Florida:*

Section 99.44, Florida Statutes, 1941, sets forth the personnel of the county canvassing board and their duties insofar as general elections are concerned, and section 102.45 sets forth the personnel of the county canvassing board and their duties with respect to primary elections. There is no mention made for compensation to be paid the members of such boards and in the absence of same such services are deemed to be gratuitous. (Rawls et al, County Commissioners, vs. State ex rel. Nolan, 122 So. page 222.)

I therefore answer the question in the negative.

October 26, 1948.—048-331

#### DUTY OF ELECTION BOARD—WRITE-IN VOTE— SAME PERSON, TWO OFFICES

QUESTION: If write-in votes should be cast at the general election for a person for an office involved in said election, such person then being the nominee of the democratic party for another office and whose name is printed as such candidate for said other office on the ballot, what duty devolves upon the election boards of the various polling places in the county



with respect to the returns they shall make concerning the votes cast for such person for said two offices?

*To Honorable John Q. Boatright, Supervisor of Registration, Suwannee County, Live Oak, Florida:*

In my opinion, the question is properly answered as follows:

The duty devolves upon the respective election boards of the polling places of the county to count all votes cast for candidates for the several offices involved in the election, whether such candidates so voted for are the regularly nominated candidates of political parties or are write-in candidates, and to make due return as contemplated by applicable law, of the results of the election with respect to votes so cast and counted by them for the candidates for the respective offices involved. The question of the right of one person to be a candidate for more than one office in the general election is not one involving the duties or discretion of said election boards. If it should develop under the circumstances set forth in the question that such person should receive the highest number of votes for more than one office, the effect thereof could then be determined.

October 26, 1948.—048-333.

#### DUTY OF CLERK—POLL LIST REQUIREMENTS

**QUESTION:** At the 1948 general election in Bay county, under the provisions of chapter 23846, Laws of Florida, acts of 1947, will it be necessary for the respective clerks of election at the several polling places in said county to keep a poll list of those voting?

*To Honorable J. B. Mashburn, Supervisor of Registration, Bay County, Panama City, Florida:*

Chapter 23846 provides for a permanent registration for electors in counties having a population of more than 42,000 and less than 48,000 according to the last preceding federal or state census. According to the 1945 state census, Bay county had a population of 43,188, and at this time appears to be the only county embraced in the population brackets of said act. By section 15 of the act, registrations provided thereby became effective January 1, 1948.

The request for opinion states that on the back of each person's registration record under this new system, provision is made for marking the same when the person votes. The request for opinion sets forth no further description of the form of "registration card" referred to in section 5 of the act.

Section 16 of the act adopts as parts of the act all general laws relating to elections and registration of persons qualified to vote therein which are not inconsistent or in conflict with the provisions of said chapter.

Section 99.37, Florida Statutes, 1941, provides that when any person shall have voted, his name shall be checked on the margin of the page opposite thereto upon the registration books by one of the inspectors, "and the clerk of the election shall keep a poll list, which shall contain one column headed 'Names of voters,' and the name of each elector voting shall be entered by the clerk in such column as he votes." Since I find nothing in chapter 23846 in conflict or inconsistent with such quoted provision of section 99.37, it would appear that such quoted portion is adopted as a part of said chapter by section 16 of the act.

In view of the foregoing, in my opinion, the above question is properly answered as follows:

At the 1948 general election in Bay county, under the provisions of said chapter 23846, it will be necessary for the respective clerks of election at the several polling places in said county, to keep a poll list of those



voting in said election as provided by section 99.37; hence, the question is answered in the affirmative.

### VOTING MACHINES

August 11, 1948.—048-269.

#### STRAIGHT PARTY TICKET—ONE OPERATION—VOTING MACHINES

**QUESTION:** Is it mandatory that the voting machines to be used in Duval county at the 1948 general election be so equipped as to permit an elector to vote a straight party ticket by one operation?

*To Honorable J. Henry Blount, County Attorney, Duval County, Jacksonville, Florida:*

Section 100.02, Florida Statutes, 1941, sets forth what is required of voting machines contemplated by chapter 100, Florida Statutes, 1941, as amended. There is no specific requirement therein that the machines shall be so equipped as to permit the voting of a straight party ticket by one operation. There is the feature, among others, that such machines may be provided with "one device for each party, for voting for all presidential electors of that party by one operation, etc."

Section 100.07, Florida Statutes, 1941, provides, among other things, that:

"Party nominations shall be arranged on each voting machine either in columns or horizontal rows; the caption of the various ballots on said machines shall be so placed on said machines as to indicate to the voter what push knob, key, lever or other device is to be used or operated in order to vote for the candidate or candidates of his choice. The order of the arrangement of parties and of candidates shall be as now required by law."

Section 100.29, Florida Statutes, 1941, provides that:

"All laws relating to elections and primaries now in force in this state shall apply to all elections and primaries under this chapter so far as the same may be applicable thereto."

Section 99.57 (chapter 20845, Laws of Florida, acts of 1941), provides, among other things, that on ballots for the general election, candidates shall be arranged in perpendicular columns, candidates for the party receiving the largest number of votes in the last preceding general election to be placed in the first column; that above each column shall appear the name of the particular party of such candidates, and a circle, and appropriate wording as provided to permit voting a straight party ticket by making a cross in the circle. Obviously, this 1941 act specifically refers to a paper ballot.

We are called upon to construe the effect of the word "now" in the above matter quoted from sections 102.07 and 102.29, the significance of which is found in the fact that the last legislative enactment of said sections was prior to 1941, viz., in 1937. As related to the ballot and method of voting upon a voting machine, the better rule would seem to construe "now" as used in said sections, as referring to laws existing at the time of the last enactment of such sections.

There is the recognized general policy to give to each voter a right of suffrage subject to no undue hindrance or burden not imposed on every other voter. It may be that were the question presented to the courts, it might be held that affording to voters using paper ballots the right of voting a straight party ticket as provided in section 99.57, and not affording the same privilege to voters using machines, would constitute such a hindrance or burden with respect to the latter, and not imposed on the former, as to do violence to the above-stated principle. However, considering the provisions of the voting machine law; the several sessions of the Legislature that have failed to provide specifically in chapter 100 that the machine be

equipped for voting a straight party ticket by one operation, other than the discretionary provision concerning presidential electors; and the obvious difference, as noted in section 99.18 between the paper ballot and voting machine ballot; these factors are of such significance as to restrain a departure by me into the field of general policy, which is primarily a judicial function, in relation to this question.

In view of the foregoing, in my opinion the question is properly answered in the negative; that is to say, that there is no mandatory requirement that voting machines to be used in Duval county at the 1948 general election shall be equipped to permit an elector to vote a straight party ticket by one operation of the machine.

August 11, 1948.—048-266.

#### VOTING MACHINES—PRINTED BALLOTS—BOND ELECTIONS

QUESTIONS: 1. Under the conditions outlined below, can the question of a tax for supervised playgrounds under chapter 418 be submitted on a separate printed ballot?

2. Can any one bond question be submitted on a separate printed ballot?

3. Can two or more, but not all, of the bond questions be submitted on a separate printed ballot?

4. Can all of the bond questions be submitted on a separate printed ballot?

5. If more than one question is submitted on printed ballots, either bond questions or a bond question and supervised playground tax together, can they be submitted on the same ballot with the proper places to vote on each separately?

*To Messrs. Hudson & Cason, Attorneys for Board of County Commissioners, Dade County, Miami, Florida:*

It appears from facts presented in the request for opinion that the county commissioners of Dade county anticipate that six bond issues will be submitted to the voters and possibly the question of whether or not a tax shall be levied for supervised playgrounds—the last pursuant to chapter 418, Florida Statutes, 1941.

You state that because of the large number of candidates and the constitutional amendments to be voted on, it will be impossible to place all six of the bond questions and the possible supervised playground tax question on the voting machines. Furthermore, the county does not have and cannot procure sufficient additional voting machines to have these questions submitted alone. In other words, the questions must be submitted on the same voting machines whereat ballots are cast for candidates.

Answering the first question, and that part of the fifth question which has reference to the proposed tax levy, the said proposed tax levy must be submitted to the qualified voters who are freeholders, and may be submitted at a general county election (section 418.08, Florida Statutes, 1941).

Section 100.43, Florida Statutes, 1941, as amended, reads as follows:

“In all counties where voting machines have been adopted the same shall be used in all general, special, primary and municipal elections.”

Section 100.05, Florida Statutes, 1941, reads as follows:

“The authorities adopting the use of voting machines shall, as soon as practicable thereafter, provide for each polling place one or more voting machines in complete working order, and thereafter the authorities in charge of elections shall preserve and keep them in repair, and shall have custody thereof when not in use

at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within such county or municipality as the officers adopting the same may direct."

Construing these two sections together, which should be done, if it becomes impossible to submit the question of this tax levy to the voters entitled to vote thereon by the use of voting machines, the officials charged with conducting said elections, may use paper ballots with respect to voting on said proposition. It is the primary purpose of all elections to encourage voters to express their choice on questions which affect their welfare.

Answering the second, third, fourth and fifth questions insofar as the same refer to contemplated bond questions, in the absence of further information, reference is made to section 103.21, Florida Statutes, 1941, which makes it unlawful for any county to hold any election for the purpose of authorizing the issuance of county bonds on the day of any state or county general election.

Should it develop, from facts not yet made known to me, that it would be lawful to submit the questions of the issuance of said bonds on the general election day, this request for opinion should be resubmitted with additional facts concerning such bond election questions.

August 18, 1948.—048-277.

#### VOTING MACHINES—PRINTED BALLOTS—BOND ELECTIONS

QUESTIONS: (The following questions have been re-submitted with more detailed information. These questions were answered by me in opinion No. 048-266, which opinion was based solely on the facts presented in the request for opinion.)

1. Under conditions outlined below, can the question of a tax for supervised playgrounds under chapter 418 be submitted on a separate printed ballot?
2. Can any one bond question be submitted on a separate printed ballot?
3. Can two or more, but not all, of the bond questions be submitted on a separate printed ballot?
4. Can all of the bond questions be submitted on a separate printed ballot?
5. If more than one question is submitted on printed ballots, either bond questions or a bond question and supervised playground tax together, can they be submitted on the same ballot with the proper places to vote on each separately?

*To Messrs. Hudson & Cason, Attorneys for Board of County Commissioners, Dade County, Miami, Florida:*

The following facts were submitted in the aforementioned opinion:

It is anticipated that six bond issues will be submitted to the voters and possibly the question of whether or not a tax shall be levied for supervised playgrounds—the last pursuant to chapter 418, Florida Statutes, 1941.

Because of the large number of candidates and the constitutional amendments to be voted on, it will be impossible to place all six of the bond questions and the possible supervised playgrounds tax question on the voting machines. Furthermore, the county does not have and cannot procure sufficient additional voting machines to have these questions submitted alone. In other words, the questions must be submitted on the same voting machines whereat ballots are cast for candidates.

The following additional facts have been supplied by you:

The said anticipated bond issues are for an armory, bridges, auditorium, a park or bathing beach, a juvenile home, and hospital.

Section 3 of chapter 23235; section 2 of chapter 23231; section 4 of chapter 23229 and section 4 of chapter 23225, special laws of 1945, respectively, authorize bond elections for an auditorium, bathing beach, juvenile home, and hospital, in Dade county, to be held on the same day as any general or special primary election. Chapter 22230, special laws of 1945, allows the Board of County Commissioners of Dade county to call bond elections for, among other things, an auditorium, bathing beach, hospital, and juvenile home, at the same time as any general or primary election is held.

Chapter 23062, Laws of Florida, 1945, reads as follows:

"All bond elections called and held under the provisions of chapter 103, Florida Statutes, 1941, or any other applicable law, in counties having populations of more than 210,000 according to the last preceding Federal Census, shall be held on the date or dates specified in the order or orders calling for such elections under said chapter 103, Florida Statutes, 1941, or any other applicable laws. Any such election or elections may be ordered to be held on the same day as any regular or special municipal, state or national election, provided separate ballot boxes and separate ballots are used and separate returns made and canvassed; provided further, that if the use of voting machines under chapter 100, Florida Statutes, 1941, or other applicable laws is authorized or required, then voting machines shall be used as provided by law." (Dade county has the required population.)

Section 100.05, Florida Statutes, 1941, reads as follows:

"The authorities adopting the use of voting machines shall, as soon as practicable thereafter, provide for each polling place one or more voting machines in complete working order, and thereafter the authorities in charge of elections shall preserve and keep them in repair, and shall have custody thereof when not in use at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within such county or municipality as the officers adopting the same may direct."

I do not pass upon the constitutionality of the special acts enumerated above or said chapter 23062.

Construing all of the laws set forth herein, if it becomes impossible to submit the questions of the tax levy and the bond issues to the voters entitled to vote thereon, by the use of voting machines, the officials charged with conducting said elections may use paper ballots with respect to voting on said propositions. As stated by me in a previous opinion the primary purpose of all elections is to encourage voters to express their choice on questions which affect their property and welfare.

I, therefore, answer the first question in the affirmative.

I answer the second, third, fourth and fifth questions, with respect to the anticipated bond issues, also in the affirmative; provided, such electors, qualified to vote on one of the said bond questions, are also qualified to vote on all of said bond questions appearing on any one ballot.

In answer to the fifth question insofar as the same contemplates the placing of the question of the tax levy with the question of the bond issues, I answer same in the negative, as I think the tax levy question should not be submitted on the same ballot with the bond questions.



I answer these questions as I do for, it is my opinion, that it is the intention of chapter 23062, that the separate ballot boxes and the separate ballots to be used; and the separate returns to be made and canvassed, have reference to such ballot boxes, ballots and returns in bond elections in contrast to the ballot boxes and ballots to be used and returns to be made and canvassed in general elections.

### ABSENT VOTERS

May 7, 1948.—048-143.

#### TIME FOR ABSENTEE VOTING—SECOND PRIMARY

**QUESTION:** What is the period of time within which absentee ballots may be voted under section 101.07, Florida Statutes, 1941, for the 1948 second primary election?

*To Honorable Howard G. Livingston, County Judge, Highlands County, Sebring, Florida:*

On April 14, 1942, by opinion No. 042-186, I advised the secretary of state, that such voting was permitted for the first primary election of that year during the period beginning Monday, April 20, 1942, and ending Friday, May 1, 1942, at midnight, the primary election that year being held on May 5, 1942.

By the same method of counting, in my opinion the period within which such voting is permitted for the 1948 second primary election, to be held on Tuesday, May 25, 1948, begins with Monday, May 10, 1948, and ends on Friday, May 21, 1948, at midnight.

April 28, 1948.—048-139.

#### CANDIDATE WITHDRAWAL—DELETION FROM BALLOT— ABSENTEE VOTING

**QUESTION:** Three persons in DeSoto county qualified as democratic candidates for nomination for the office of state representative in the 1948 primary election. Official ballots for said election have been printed, upon which appear the names of such three candidates, and absentee voting under sections 101.07, et seq., Florida Statutes, 1941, is now in progress. One of such candidates has announced his desire to withdraw from such race. At this time may the name of such person be deleted from the official ballot to be used at said election?

*To Honorable John H. Treadwell, Attorney, Board of County Commissioners, DeSoto County, Arcadia, Florida:*

There appears to be no statute bearing directly upon the withdrawal of persons from the primary after they have qualified. There is a provision related to this subject as to candidates in general elections (section 99.11, Florida Statutes, 1941).

Section 101.07, Florida Statutes, 1941, having to do with absentee voting under the circumstances therein set forth, among other things, provides that the qualified elector "may apply in person to the county judge of his home county . . . for an official ballot to be used at his voting precinct . . . at such election." Hence, it would seem that the ballot furnished for the use of such an absent voter and the ballot used at the primary election in the voter's precinct shall be the same as to form, subject only to such difference as may possibly be occasioned by the deletion from said ballot of candidates' names for their failure to observe or their violation of certain of the primary election laws (e.g., sections 102.61, 102.62 and 102.64, Florida Statutes, 1941).

In view of the foregoing, in my opinion such grave doubt exists of the legal right to delete from said ballot at this time the name of such candi-



date who now desires to withdraw, that ordinary caution dictates that such should not be done.

May 19, 1948.—048-164.

#### COUNTY JUDGE'S OFFICE—ABSENTEE VOTING

QUESTIONS: 1. Is there any provision of law whereby a person confined to bed and therefore unable to vote at a regular polling place may vote in a primary or regular election?

2. Is it lawful for a county judge to carry a ballot to a sick person's home during the period allowed for absentee voting before an election, and allow such person to vote said absentee ballot at his said home?

*To Honorable Clyde Brown, Supervisor of Registration, Franklin County, Apalachicola, Florida:*

In answer to the first question, I will say that the law makes no provision whereby a person confined in bed may vote.

I, therefore, answer the first question in the negative.

In answer to the second question, I find no law permitting, or allowing, the county judge to have such person vote an absentee ballot under the circumstances mentioned in the question. For the purpose of absentee voting, under section 101.07, et seq., the county judge's office and that alone appears to be the designated polling place.

I, therefore, answer your second question in the negative.

May 11, 1948.—048-159.

#### FEE—COUNTY JUDGE—VOTING PLACE ABSENTEE BALLOTS

QUESTIONS: 1. Is there any fee allowed the county judge for voting absentee ballots under section 36.17, Florida Statutes, 1941, or otherwise?

2. Is there any way of designating the office of the county judge in Clewiston for voting absentee ballots in Hendry county, Clewiston not being the county seat of said county?

*To Honorable R. M. Harris, County Judge, Hendry County, LaBelle, Florida:*

In answer to the first question, I find no provision for paying the county judge for performing his duties under section 101.07, et seq., Florida Statutes, 1941, with respect to absentee voting under said provisions of law. No mention being made for compensation to be paid to said judge for such services, in the absence of same, such services are deemed to be gratuitous (Rawls, et al., County Commissioner v. State ex rel. Nolan, 122 So. 222). Section 36.17, paragraph 2, Florida Statutes, 1941, has no reference to fees with respect to absentee ballots.

In answer to the second question, in my opinion the said law requires the voting to be done in your office, which is in the court house of LaBelle, Florida, and which for the purposes of absentee voting under section 101.07, et seq., appears to be the designated polling place.

#### PRIMARY ELECTIONS

April 5, 1948.—048-117.

#### VACANCIES—PARTY EXECUTIVE COMMITTEE

QUESTION: Where vacancies exist on party executive committees because of the failure of party members to run for such offices now vacant in the 1946 primary election, how are such vacancies properly filled?

*To Honorable J. R. Pomeroy, Clerk, Circuit Court, Martin County, Stuart, Florida:*

Specifically, the request for opinion states that a number of candidates have filed for some of these vacancies in the primary this year.

Here are involved party offices as distinguished from public offices. They are offices provided by statute (section 102.07, Florida Statutes, 1941). There is a state, congressional, and county executive committee. As to each, said section provided for election of members thereto for four-year terms in the 1942 primary election and every four years thereafter. The statute provides specifically for the filling of vacancies on such committees, as set forth below.

In my opinion, the question is properly answered as follows:

In the event of no election of committeemen or committeewomen, or of a vacancy occurring from any cause, in any county executive committee the chairman of the State Executive Committee shall have the power to fill such vacancy by appointment; and in event of no election or of a vacancy occurring from any other cause in a state or congressional executive committee, the executive committee, or majority thereof, of the county so without representation, may fill such vacancy by election. For further details concerning such matters, see said section 102.07. Hence, it appears there is no statutory authority for the filling of such vacancies by election in the 1948 primaries. The foregoing is in harmony with opinion No. 043-219, Biennial Report of Attorney General, 1943-1944, page 156.

June 23, 1948.—048-216.

#### COUNTY EXECUTIVE COMMITTEE—VACANCY—MEMBER MOVES FROM PRECINCT

**QUESTION:** When a member of a county executive committee, during the term for which elected, moves from the precinct from which elected into another precinct in the county, and registers and votes in such new precinct, does a vacancy occur in such office of committee member, in view of the provisions of section 102.07, Florida Statutes, 1941, and section 7 of the by-laws of said committee providing that, "To be eligible for Committee Man or Committee Woman they must live in the Precinct which they represent"?

*To Mrs. Alice Carroll, Acting Secretary, Democratic Executive Committee, Escambia County, Pensacola, Florida:*

The question, based upon the facts set forth in the request for opinion, refers to a committee member's moving into another precinct and there registering and voting; hence, it is assumed without question that there is a changing of legal residence to such new precinct.

This is primarily a party matter involving party officers as distinguished from a public matter and public officers; and one for determination by the committee involved. Furthermore, in the event of a vacancy in any county committee, the chairman of the State Executive Committee is authorized to fill such vacancy, as provided in section 102.07 (4), Florida Statutes, 1941; hence, there may devolve upon such state chairman the exercise of his judgment, under certain circumstances, as to whether a vacancy exists. Hence, it would seem proper for this office to go no further than to suggest the apparent intent of the law.

Section 102.07, mentioned above, provides the manner of electing members of a county executive committee, and also the filling of vacancies occurring in such committee. It occurs to me that the quoted portion of section 7 of the by-laws of the committee is in accord with the reasonable intent and purpose of the applicable provisions of section 102.07. If such

position is accepted, then it would seem that removal of a member of the committee from the precinct from which elected, under the circumstances set forth in the question, would occasion a vacancy in the committee.

March 17, 1948.—048-97.

#### CANDIDATE—ADJUDGED INSANE

**QUESTION:** A person who qualified as candidate for nomination for the office of sheriff in the 1948 primaries, subsequently was adjudged insane. What action, if any, should be taken at this time by the clerk of the circuit court of the county with whom such person qualified, with respect to such person's candidacy?

*To Honorable Millard F. Caldwell, Governor:*

The oath of a candidate who qualifies to run in the primaries recites, among other things, that he is a member of a named political party, and that he is a qualified voter in his county (section 102.29, Florida Statutes, 1941). In the absence of anything in the letter to the contrary, we assume that when the person referred to in the question filed such oath, he was not insane; however, if he was insane at that time, further consideration of the question will be required. An insane person is not a qualified voter (article VI, section 4, Florida Constitution; section 98.01, Florida Statutes, 1941); hence, it would reasonably appear that an insane person may not have his name printed on the primary ballot (and, generally on the point, see section 101, 44 C.J.S., page 268). On the other hand, this person's sanity may be restored prior to the preparation of the ballot and in sufficient time for him to comply with the primary election laws in connection with his candidacy.

Hence, it is suggested that the clerk do nothing now concerning the candidacy of this person; and that at a later date and prior to the time the ballot must be prepared that this clerk, if he then desires, renew his request for advice, stating the situation as it then exists concerning this person's condition, and whether proper expense statements have been timely filed in connection with his candidacy. If his mental status is then unchanged from what it is now, or for any reason there has been a failure to comply with the primary election laws, all questions then existing can be answered.

April 1, 1948.—048-114.

#### PARTY ASSESSMENTS—DISTRIBUTION

**QUESTION:** Where a circuit judge in this state is nominated and elected by the electors of a single county, to whom should the political party assessment paid by him be distributed by the secretary of state?

*To Honorable R. A. Gray, Secretary of State:*

This question seems to be applicable to the "Judge of the Circuit Court of Duval County," provided by section 42, article V, of the state constitution, and to the judges of the circuit court of the thirteenth judicial circuit which is confined to Hillsborough county. The same question might be applicable to the state attorney of the thirteenth circuit.

Section 102.36, Florida Statutes, 1941, as amended, requires that candidates for circuit judge "pay their filing fee to the secretary of state . . . and pay or file receipt with the secretary of state . . . for their party assessments, if any has been levied." Section 102.27, Florida Statutes, 1941, provides that "the executive committees of each political party . . . for the purpose of meeting their legitimate expenses and maintaining their party organizations, may levy assessments upon such candidates of their respective parties as are required by section 102.31 to pay filing fees . . . (not) . . . exceeding two per cent of (their) . . . annual salary . . . provided,

county executive committees shall have exclusive power to levy assessments upon candidates to be voted for only in a single county. . . ." Section 102.31 provides that "each candidate for nomination for any office herein provided for, shall be required to pay a filing fee" and fixes the amount of such fee. Section 102.33 provides that "each candidate for nomination for an office to be voted for wholly within a single county shall file his sworn statement and receipt for committee assessment . . . with . . . the clerk of the circuit court of said county"; however, this section, insofar as it relates to circuit judges, appears to have been amended by section 102.36 above referred to, which provides for payment to the secretary of state.

It appears that the resolution of the State Executive Committee now in force fixes the democratic committee assessments to be paid by candidates to be voted on in two or more counties, but does not mention candidates to be voted on in only one county. It also appears that assessments collected for prior primary elections, where the candidate was voted on in only one county, including state senators and the circuit judge for Duval county, have heretofore been remitted to the County Executive Committee. This seems to be a departmental construction of the statutes in question and entitled to consideration. Although the candidates in question are candidates for nomination for a state office, the statutes in question do not seem to make any distinction between candidates for state and county office, but the distinction is between candidates to be voted on in one and those to be voted on in more than one county.

The political party assessments in question should be distributed, by the secretary of state, to the executive committee of the county wherein the candidate is to be voted on.

May 10, 1948.—048-150.

#### SPECIAL PRIMARIES—BALLOTS—EXPENSE STATEMENTS— COMMITTEE ASSESSMENTS

QUESTIONS: 1. Shall the secretary of state collect from such candidates who seek to qualify in said special primary elections the two percent (2%) assessed by the committee in addition to the three percent (3%) payable to the state?

2. Shall the candidates in said special primary election be required to file expense statements, and, if so, what will be the proper date or dates to require the filing of such expense statements by said candidates?

3. Will it be permissible for the candidates' names to be printed on the same ballot as used in the second regular primary, or will it be necessary for the county commissioners in preparing the ballot for said special primary elections to prepare a separate ballot from the ballot used in the second regular primary?

*To Honorable R. A. Gray, Secretary of State:*

The State Democratic Executive Committee has filed with the secretary of state two resolutions, duly certified, calling a special primary to be held on May 25 for the purpose of nominating a candidate to fill the unexpired term caused by the retirement of Supreme Court Justice Rivers Buford and also calling a special primary on the same date for the purpose of filling the vacancy in nomination of the democratic party for judge of the sixth judicial circuit caused by the resignation of Honorable T. Frank Hobson. Said resolutions contain the provision, among others, that, "In addition to the three percent (3%) of the annual salary of the office the candidate for nomination seeks . . . an additional amount equal to two percent (2%) of the annual salary of such office is hereby levied and assessed for the uses and purposes of the expenses of this committee." The resolutions set 12 o'clock noon, May 15, as the last day for candidates to qualify for such offices, but make no reference to the filing of expense statements.



In my opinion, the foregoing questions are answered in their numbered order as follows:

(1) The law appears to be clear that no assessment shall be made by any executive committee in the event of a special primary election (section 102.27, Florida Statutes, 1941). I am not unmindful of the resolution of the State Democratic Executive Committee when it sought to require such committee assessments, but I feel that the committee overlooked the provisions of said section 102.27.

(2) There seems to be no law specifically bearing upon this question, and it appears that the committee, in such resolutions did not take the matter of filing of expense statements into consideration. In the event the committee fails to set the dates or requirements concerning the filing of expense statements, it would seem that since candidates in these special primaries have until May 15 to qualify, reasonably the provisions of section 102.57, Florida Statutes, 1941, concerning the first and second statements are not applicable to them. Such candidates, however, should comply as closely as possible with the general primary laws relative to this subject; hence, it would seem reasonable to hold that they are required to file the after-primary statement provided by said section 102.57. Such statement shall set forth the entire expenses of such candidates and such other information as contemplated and required by section 102.57; and shall be filed within ten days after the second special primary election, if such is required, and if not, within twenty days after May 25. Attention is also directed to the requirements of section 102.59, Florida Statutes, 1941.

(3) It would seem proper for the county commissioners in preparing the ballot for the special primary election to prepare a separate ballot from the ballot to be used in the second general primary, the ballot to be suitably designated as an official ballot for a special primary election. In those counties where the electors will vote only for the nomination of a candidate for the supreme court, such candidates will be the only ones on said special primary ballot, but in the counties composing the sixth judicial circuit such special primary ballot will have not only the candidates for nomination for the supreme court but also candidates for nomination for the office of circuit judge of said circuit. There appears to be no provision in the laws of the Constitution of the State of Florida prohibiting the use of the same election officials for both the general primary election and these special primary elections on May 25. However, as a matter of caution, it is suggested that while the same election officials may be used in the election districts to preside at the polls in both elections, separate appointments of such officials should be made as to the special primary election and as to such general primary election, and they should subscribe to separate oaths or affirmations as to each election with respect to their duties to be performed as prescribed by law.

January 20, 1948.—048-18.

#### FILING FEE—AMOUNT OF FEE—LEGISLATIVE CANDIDATES

QUESTION: What is the filing fee required of a candidate for nomination for the office of representative in the state Legislature in the 1948 primaries?

*To Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Ft. Lauderdale, Florida:*

The filing fee required by section 102.31, Florida Statutes, 1941, is computed on the compensation of \$360.00, and three per cent of that figure is \$10.80. It is remarked that on the same basis of compensation the committee assessment as contemplated by section 102.27, Florida Statutes, 1941, amounts to \$7.20. To the same effect see opinion No. 044-1, Biennial Report of Attorney General, 1943-1944, page 140.

February 3, 1948.—048-37.

#### LEGISLATIVE CANDIDATE—FILING FEE

**QUESTION:** In computing the filing fee required of a candidate for nomination for the office of state representative in the 1948 primaries, should the expense money provided each legislator by chapter 23685, Laws of Florida, acts of 1947, be added to the regular compensation for legislators as provided by our laws and constitution?

*To Honorable Ralph E. Harbert, Clerk, Circuit Court, Flagler County, Bunnell, Florida:*

In my opinion No. 048-18, dated January 20, 1948, I held that the filing fee required of a candidate for nomination for the office of state representative in the 1948 primaries, required by section 102.31, Florida Statutes, 1941, should be computed on the compensation of \$360.00; hence, the filing fee is \$10.80, as you have figured it. The party committee assessment would, of course, be computed on the same compensation figure. The provisions of chapter 23685, Laws of Florida, acts of 1947, that each legislator shall be paid \$6.00 per day for the additional purchases of postage stamps and for all other necessary and incidental expenses not now supplied by the Legislature, did not supply additional compensation within the contemplation of said section 102.31.

January 26, 1948.—048-21.

#### SUNDAY QUALIFICATION—DUTY OF CLERK—COUNTY CANDIDATES

**QUESTIONS:** 1. In view of the fact that February 1, 1948, falls upon a Sunday, and that under the law certain candidates must qualify not later than 12 o'clock noon on that date for the 1948 primaries, should the office of the clerk of the circuit court of Holmes county remain open to receive qualifying papers of candidates up to 12 o'clock noon, February 1, 1948, or is such time for qualifying terminated with the close of business on Saturday, January 31, 1948?

2. As to certain candidates for nomination in the 1948 primaries for those county offices with respect to which the candidates must qualify not less than forty-five days previous to the day of the primary election, what is the exact time when the period permitted for such qualifying ends?

*To Honorable J. H. Little, Clerk of the Circuit Court, Bonifay, Florida:*

In my opinion the questions are properly answered in their numbered order as follows:

(1) It would seem to be the generally accepted rule that in the absence of statute prohibiting it, lawfully, a purely ministerial act may be performed by a public official on Sunday, and such was the common law rule (50 Am. Jur. 863, section 9). In each of our statutes requiring candidates to qualify by February first, the wording is that they must do so "not later than" such date. In the absence of the court having construed the question, it would seem that the only safe course to pursue is for the public officer to accept qualifying papers and required fees of candidates up to 12 o'clock noon, February 1, 1948. This office is advised that the secretary of state intends to keep his office open up to such time to permit those candidates who are required to qualify with him to do so.

(2) The closing day and time for candidates who must qualify not less than forty-five days previous to the day of the primary election is 12 o'clock noon, March 20, 1948 (section 102.29-1 and section 102.33, Florida Statutes, 1941, as amended).

February 2, 1948.—048-32.

COUNTY ATTORNEY—FILING FEE—COMPENSATION

QUESTIONS: 1. Acting under chapter 23325, special act of 1945, the net compensation of the county attorney for Highlands county for 1947 was \$4,501.00, which is made up of a salary of \$1200.00 per year and reasonable fees. This act was amended by chapter 24558, special act of 1947, which fixed the salary of the said county attorney at \$500.00 per year and reasonable fees. What should a candidate for the office of county attorney for Highlands county pay in order to qualify in the May 1948 primary?

2. Does said chapter 24558, special act of 1947, affect the compensation of the present county attorney elected under chapter 23325, special act of 1945, in view of section 4 of said chapter 24558, special act of 1947? Section 4 reads: "This act shall not affect the tenure of the office of county attorney as elected in 1944, nor the commission issued subsequent thereto."

3. Is chapter 24558, acts of 1947, constitutional?

*To Honorable M. R. McDonald, Attorney, Board of County Commissioners, Highlands County, Sebring, Florida:*

Section 102.31, Florida Statutes, 1941, fixes the amount of filing fee of said candidate at 3% "of the annual salary or compensation of the office sought by the candidate."

It is necessary that some "yard stick" be used to ascertain the amount of such filing fee, and I know of no better one in this case where the compensation is made up of a fixed salary and fees than to use the net compensation of the office for the year immediately preceding the year in which the primary election is to be held, taking into consideration the reduction in the salary made by the special act of 1947, and the elimination of certain duties imposed upon said attorney.

This "yard stick," however, could not be used in every instance for there are exceptions to every rule.

Using the compensation earned by this office in question for the year 1947, and bearing in mind the salary and duties which are affected by said special act of 1947, in my opinion, the correct fee to be paid by a candidate for county attorney in your county, under the facts as above set forth, would be 3% of \$4,501.00, less \$700 (which \$700.00 is the amount of the reduction of the salary between the salary as set forth in the special act of 1945 and as set forth in the special act of 1947), unless the fees earned can be segregated into those earned because of representing the county commissioners and those earned because of representing the Board of Public Instruction. If this segregation can be made then the 3% should be figured only upon \$500.00, plus the fees earned in 1947 because of representing the county commissioners.

As to the second question, said special act of 1947 eliminates certain duties of the said county attorney and provides for a reduction in salary from that provided by the special act of 1945. Said special act of 1947 does not affect the tenure of the office of county attorney, or the official commission issued to him; however, it does not preserve unto him the salary of the 1945 special act but places his salary under the 1947 special act from the time said special act of 1947 became a law.

I do not answer the third question as it is not the policy of this office to pass upon the constitutionality of any act. I feel this is a matter for the courts to decide and until the law is held unconstitutional I must construe it as being constitutional. Of course, if you desire to test the constitutionality of the law it is rather a simple matter under our declaratory judgment act.

February 2, 1948.—048-35.

#### TAX ASSESSOR—FILING FEE—HAMILTON COUNTY

**QUESTION:** What amount of filing fees should be paid, under section 102.31, Florida Statutes, 1941, by candidates for nomination to the office of tax assessor and tax collector of Hamilton county, Florida?

*To Honorable R. A. Gray, Secretary of State:*

Said section 102.31 provides that the amount of "filing fee shall be three per cent of the annual salary or compensation of the office sought by the candidate." The annual salary or compensation of the office seems to refer to the net salary or compensation payable to the officer for services as such official (1939-40 Biennial Report, 111). If the officers were paid a fixed annual salary, then the salary for their first year in office might be taken (1935-36 Biennial Report, 337, and 1945-46 Report, 198); however, the officers in question received commissions and not a salary (section 193.65, Florida Statutes, 1941, as amended) with a guarantee that their compensation should be not less than \$3600.00 per annum. (Chapter 24259, Laws of Florida, acts of 1947.) For many years it has been the practice in this state to calculate the filing fees for officers receiving fees instead of salary upon the amount paid by the office for the year next preceding the year in which the primary election is held. This practice has long since become a departmental construction of the law and should be followed unless it is clearly erroneous (59 C. J. 1025, §609). The departmental construction placed upon the law seems to be the only reasonable construction, and the statute itself seems to admit of such a construction.

I am, therefore, of the opinion that the filing fees to be paid by candidates for nomination to the office of tax assessor and tax collector of Hamilton county should be three per cent of the compensation received by such officers for the year 1947 unless such amount was less than the \$3600.00 guaranteed by said chapter 24259, in which case it would be three per cent of the said \$3600.00.

February 6, 1948.—048-45.

#### FILING FEE—SCHOOL BOARD MEMBER

**QUESTION:** What filing fee is required of candidates for nomination for the office of school board member from the two newly created school board member districts in Madison county, under section 102.31, Florida Statutes, 1941?

*To Honorable D. F. Burnett, Clerk of the Circuit Court, Madison County, Madison, Florida:*

It is here assumed that the general laws of this state relative to compensation of school board members are applicable to Madison county, and this opinion is conditioned upon such assumption. If there is a special act for said county fixing such compensation, the request for opinion should be renewed, mentioning such act.

Section 102.31 provides that the amount of filing fee "shall be three per cent of the annual salary or compensation of the office sought by the candidate." Heretofore we have held that if the law provides a fixed annual salary for the office, the salary for the first year is the compensation referred to in the statute (our opinions numbered 046-90 and 048-35); and as to fee officers, the net amount received for the year next preceding the year of the election is the compensation to be used for the purposes of this statute (our opinion numbered 048-35). In our opinion No. 048-23, we held that no filing fee was required of a candidate for office of justice of the peace in an instance where the incumbent during 1947 neither earned nor received any fees from the office. However, the situation reflected by the question is not analogous to that found in the last-mentioned opinion.



Prior to its amendment by section 44, chapter 23726, Laws of Florida, acts of 1947, section 242.02, Florida Statutes, 1941, provided that county school board members should be paid from the county school fund for their services the sum of \$4.00 per day for each day's service and ten cents per mile for travel expense to and from the courthouse. As amended, section 242.02 now provides that school board members shall receive \$10.00 per day and stated mileage for participation in each regular and special meeting of the board; provided that such allowance shall not be made for more than eighteen meetings "in any one fiscal year in counties having a population of less than 80,000 according to the last preceding state or federal census," and providing further that this provision shall not apply until January 1, 1951, in counties wherein such compensation is prescribed by special, local or population act. Note is taken of the fact that this section makes reference to "fiscal year," and it is recognized that a school fiscal year begins July first. Nevertheless, it would appear that such compensation, for the purposes of section 102.31, should be computed on the increased pay per day and the limited number of meetings set forth in section 242.02, as amended, and the number of meetings of said board during the year 1947.

In view of the foregoing, in my opinion the question is properly answered as follows:

For the purposes of section 102.31, the annual compensation of said candidates shall be computed on the number of meetings of said school board during 1947 at \$10.00 for each meeting, but not in excess of \$180.00.

January 29, 1948.—048-23.

#### FILING FEE—COMPENSATION—RULE FOR COMPUTING FEE

**QUESTION:** What filing fee, under section 102.31, Florida Statutes, 1941, is required of a candidate for nomination for office of justice of the peace in the 1948 primaries, when the official now holding that office did not draw any compensation in the year 1947?

*To Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Fort Lauderdale, Florida:*

In addition to the fact, as evidenced in the question, that no compensation was drawn during 1947 by the incumbent officer, it is assumed that no compensation was earned by the incumbent during such period; and this opinion is conditioned on that assumption.

The filing fee required by section 102.31 is "three per cent of the annual salary or compensation of the office sought by the candidate; provided that no filing fee shall be required of any candidate for any office to the holder of which no salary or compensation is required to be paid."

With respect to fee officers, the statute fixes no rule or yardstick for computing annual compensation for the purposes of this required fee. In the absence of any such rule, it would seem that reasonably the fee is to be computed upon annual compensation of the fee office involved for the preceding year.

Under the circumstances here found, and in pursuance of the view expressed, it is my opinion that in the foregoing, no filing fee is required of the candidate for the office contemplated by the question.

January 7, 1948.—048-5.

#### CIVIL COURT JUDGE—FILING BY CANDIDATE FOR JUDGE

**QUESTION:** Should a candidate for nomination in the next primaries for the office of judge of the civil court of record of Duval county, Florida, file his sworn statement, receipt for party committee assessment and filing fee with the secretary of state or the clerk of the circuit court of said county?

*To Honorable R. A. Gray, Secretary of State:*

Section 102.33, Florida Statutes, 1941, requires that each candidate for nomination for an office to be voted for wholly within a single county shall file such statement and receipt and pay his filing fee to clerk of the circuit court of such county. Other statutes with reference to specifically named offices present exceptions (as to state senators, circuit judges and state attorneys, exceptions as to certain counties) to the general provisions of section 102.33, as follows: judges of circuit courts (section 102.36); state attorneys (section 102.66); judges of criminal courts of record, judge of the court of record of Escambia county, and county solicitors (section 102.67); and state senators (section 102.69). It appears that none of these statutes dealing with specific offices have reference to candidates for nomination for the office of judge of the civil court of record of Duval county, Florida.

In view of the foregoing, it appears that a candidate for nomination in the primaries for the office of judge of the civil court of record of Duval county, Florida, should file his required papers for qualifying with, and pay his filing fee to, the clerk of the circuit court of Duval county, Florida, in pursuance of the provisions of said section 102.33.

March 12, 1948.—048-91.

#### CRIMINAL COURT OF RECORD—QUALIFICATION—DATE FOR CLERK—TERM

QUESTION: Are persons who desire to be candidates for nomination for the office of clerk of the criminal court of record of Palm Beach county required to qualify as such candidates by 12 o'clock noon, March 20, 1948?

*To Honorable J. Louie Carter, Clerk, Criminal Court of Record, Palm Beach County, West Palm Beach, Florida:*

This court was created under the provisions of chapter 11363, Laws of Florida, Ex. Sess. 1925; and it is assumed such act was introduced and passed in pursuance of application of a majority of the registered voters of said county. The clerk of the court is elected for a four-year term. The first election of the clerk was held at the 1926 general election, which fixed the four-year term. Properly, it appears that the present incumbent was elected at the 1946 general election. See article V, sections 24 and 30, Florida Constitution; section 32.10, Florida Statutes, 1941, and as amended by chapter 24107, Laws of Florida, acts of 1947.; and, In Re Advisory Opinion to Governor, 94 Fla. 986, 114 So. 889. While section 1 of said chapter 24107 (amended section 32.01, Florida Statutes, 1941), recited that there is "established" in Palm Beach and other named counties a criminal court of record, the quoted word is not to be construed as creating such court in Palm Beach county, but recognizing the existence of such court. Neither such feature, amended section 32.10 (section 1, chapter 24107), nor any other provision of chapter 24107 is construed as disturbing the cycle of the four-year term of the clerk, as indicated herein.

In my opinion, the foregoing question is properly answered as follows:

Candidates for nomination for the office of clerk of the criminal court of record of Palm Beach county may properly run in the 1950 primaries after qualifying in 1950 during the period of time fixed in the law during which such candidates should qualify for said election. Hence, the question is answered in the negative.

August 17, 1948.—048-274.

#### REFUND FILING FEE—DEATH OF CANDIDATE

QUESTION: In due time prior to the 1948 primaries, a person paid the filing fee required of him as a candidate for the office of sheriff of his

county, which filing fee was deposited by the clerk of the court in the general revenue fund of the county; and, thereafter, on April 26, 1948, such person died. Properly, may the Board of County Commissioners of Suwannee County refund from said county fund to the administratrix of the estate of such deceased person, upon her request therefor, the amount of such filing fee so paid?

*To Honorable J. L. McMullen, Clerk, Circuit Court, Suwannee County, Live Oak, Florida:*

Heretofore this office has held (my opinion No. 046-57), that when a candidate in the primary withdraws after the expiration of the time for qualifying, he is not entitled to return of his qualifying fee unless he can show his withdrawal is occasioned by physical disability. Specifically, I held in opinion No. 044-119, that when a candidate withdraws because of physical disability subsequent to the dead-line for qualifying, he was entitled to refund of such fees. These opinions seem to require the further position that under the circumstances set forth in the question, refund should be made of this person's filing fee. Hence, in my opinion the amount of filing fee paid by this person as a candidate under section 102.31, Florida Statutes, 1941, may properly be refunded to the administratrix of his estate by the county commissioners from the general revenue fund into which such filing fee was deposited.

March 24, 1948.—048-104.

#### CANDIDATES—STATE ATTORNEY WITHDRAWS—FILING FEE NOT RETURNABLE

QUESTION: May a candidate who qualified for nomination in the 1948 primaries for office of state attorney, and who withdraws as such candidate subsequent to the time when candidates could qualify for said office, properly have refunded to him by the secretary of state the qualification fee paid by him in connection with such candidacy?

*To Honorable R. A. Gray, Secretary of State:*

The request for opinion states that this candidate paid to the secretary of state the three per cent filing fee and the two per cent party committee assessment.

The two per cent committee assessment was received by the secretary of state as agent for the committee to which it is payable; and any application for refund of such assessment should be made to and determined by that committee. Under the circumstances found here, in my opinion the three per cent filing fee paid by this candidate to the secretary of state may not be refunded to this candidate. This holding appears to accord with the intent of the statutes involved and previous rulings of this office. Nothing short of an act of the Legislature specifically providing for refund of such amount would authorize the secretary of state to make such refund.

January 23, 1948.—048-20.

#### FILING DATE—COUNTY CANDIDATES—EXPENSE STATEMENTS

QUESTIONS: 1. What is the last day on which candidates for nomination for county offices in the 1948 primaries may file their sworn statements and receipts for committee assessments with the clerk of the circuit court of Broward county under section 102.33, Florida Statutes, 1941?

2. Between what dates must such candidates file their campaign expense statements, under section 102.57, Florida Statutes, 1941, with said clerk of the circuit court?

3. Between what dates must said candidates file their statements of political workers as required by section 102.59, Florida Statutes, 1941, with said clerk of the circuit court?

*To Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Fort Lauderdale, Florida:*

Section 102.33, Florida Statutes, 1941, does not specifically refer to candidates for county office, but does refer to those candidates for nomination to be voted for wholly within a single county. It is assumed that exceptions or possible exceptions to the provisions of said section as found in sections 102.36, as amended, 102.66, 102.67 and 102.69 are familiar to the officer requesting the opinion; and the public officers mentioned in such sections are excepted from the effects hereof. Likewise, possible elective officers in Broward county, in pursuance of acts particularly applicable therein, as distinguished from general laws, are excepted from the effects hereof. If information is desired concerning any particular office, the same will be furnished upon request thereof. While a state representative would appear to be a state officer, since he must qualify with the clerk of the court, provisions of section 102.70 are mentioned which require candidates for such office to file sworn statements and pay filing fees not later than 12 o'clock noon, February 1, 1948, and pay or file receipt for committee assessment not later than March 31, 1948; and the conclusions set forth below are applicable to such office except those set forth in paragraph (1).

The questions are answered in their numbered order as follows:

(1) Such candidates for nomination for county office in the 1948 primaries must file their sworn statements and receipts for committee assessments with, and pay the filing fee to, the clerk of said circuit court not later than 12 o'clock noon, March 20, 1948 (sections 102.29-1 and 102.33, Florida Statutes, 1941).

(2) Such candidates shall file their campaign expense statements with the clerk of said circuit court during the following times: The first statement not earlier than April 4, 1948, and not later than April 9, 1948; second statement not earlier than April 22, 1948, and not later than April 26, 1948; third statement not later than June 4, 1948 (section 102.57, and chapter 22627, Laws of Florida, acts of 1945).

(3) Such candidates shall file with the clerk of said circuit court their statements of political workers not later than June 4, 1948 (section 102.59, Florida Statutes, 1941).

April 9, 1948.—048-123.

#### SINGLE CANDIDATE—BALLOT—PRINTED NAME UNNECESSARY

QUESTION: Where two persons qualified as candidates for nomination for the office of state representative in the 1948 primaries, and one of such persons, not long prior to March 20, 1948, withdrew from such race and qualified for nomination for the office of county commissioner in such primaries, is it necessary that the name of the one remaining candidate for the office of state representative be printed upon the primary election ballot?

*To Honorable James W. West, Attorney, Board of County Commissioners, Sumter County, Bushnell, Florida:*

It will be noted that in the foregoing question it is stated without qualification that of the two persons who qualified as candidates for nomination for the office named, one has withdrawn and it is assumed that such withdrawal was a formal one and is without question. Assuming such to be true, it is obvious there is then left only one person in Sumter county presently qualified as a candidate for the office named. It would therefore appear that under the provisions of section 102.34, Florida Statutes, 1941,



that since only one such candidate now remains, it is not necessary that such candidate's name be printed upon the 1948 primary election ballot.

February 10, 1948.—048-48.

QUALIFICATION DATE—JUDGE AND SOLICITOR, COURT OF  
RECORD—FEES

QUESTION: With what public officer and within what time are candidates for nomination in the 1948 primaries for the offices of judge and solicitor of the court of record of Pasco county, Florida, required to qualify?

*To Honorable A. J. Burnside, Clerk of the Circuit Court, Pasco County, Dade City, Florida:*

The court of record of Pasco county, Florida, is a statutory court established under the provisions of chapter 22837, Laws of Florida, acts of 1945. Section 6 of the act provided for the appointment of a judge of said court, whose term of office should expire on the first Tuesday after the first Monday of January, 1949, and that, "his successor shall be elected at the general election in 1948 under the same laws and regulations as circuit judges are elected." Section 8 of the act provided for the appointment of the solicitor of said court for a like term as fixed for the first judge thereof, and that, "his successor shall be elected at the general election in 1948, under the same laws and regulations as state's attorneys are elected."

Sections 46 and 48, article V, Florida Constitution, changed the offices of circuit judge and state attorney from appointive to elective ones, and provided that the first election of said officers should be held at the 1948 general election. A candidate for nomination in the primaries for the office of circuit judge or state attorney is required to file his sworn statement with, and pay filing fee to, the secretary of state not later than 12 o'clock noon on the first day of February previous to the first primary election, and to pay to, or file receipt for party committee assessments with, such officer not later than March thirty-first, following. (Sections 102.29-1, 102.36 and 102.66, Florida Statutes, 1941, as amended.)

As now constituted, it appears that primary elections in this state are a part of the general election processes; hence, in view of the quoted wording from sections 6 and 8 of chapter 22837, it is reasonable to assume that the provisions of section 102.33, Florida Statutes, 1941, are not applicable to the offices in question.

In view of the foregoing, in my opinion the question is properly answered as follows:

Candidates for nomination in the 1948 primaries for the offices of judge and solicitor of the court of record of Pasco county, Florida, were required to file with, and to pay to, the secretary of state their sworn statements and filing fees not later than 12 o'clock noon, February 1, 1948. They are required to pay to the secretary of state their party committee assessment, or file receipt with him for the same, if any has been levied, not later than March 31, 1948.

April 19, 1948.—048-131.

BALLOTS, POLL LISTS, OATHS—DISPOSITION BY ELECTION  
BOARD

QUESTIONS: 1. Should the poll list and the oaths of the inspectors and clerk of an election board be sealed inside of the ballot box when returned to the supervisor of registration, or be returned sealed in a separate package or envelope, in view of the provisions of section 102.44, Florida Statutes, 1941?

2. If these lists and oaths are returned enclosed in the ballot box, has the supervisor of registration authority to open the box and check contents before the meeting of the canvassing board?

3. Is there a penalty for failure of the officials of an election board to return the poll lists to the supervisor of registration?

*To Miss Ella Lee Lloyd, Supervisor of Registration, Jefferson County, Monticello, Florida:*

In my opinion the questions are properly answered in their numbered order as follows:

(1) Section 102.44, Florida Statutes, 1941, after providing for the delivery of two tally books, with required certificates, one to the county judge and the other to the supervisor of registration, requires that, "the poll lists and oaths of the inspectors and clerks, together with all ballot boxes, ballots, ballot stubs, memoranda and papers of all kinds used by the inspectors and clerks shall also be transmitted, sealed by the inspectors, to the supervisor of registration to be filed in his office, and carefully preserved by him until after the next succeeding general election." Section 102.44 derived from original enactment chapter 6469, Laws of Florida, acts of 1913, and the several amendments thereof. One of these amendments, chapter 6874, Laws of Florida, acts of 1915, had a provision in it similar to that above quoted; and in commenting on such provision in the 1915 act, our supreme court in *State vs. Haskell*, 72 Fla. 176, 244, 72 So. 651, 659, stated, in part, "This enactment requires the delivery to the supervisor of registration of the ballots, etc., sealed up in the ballot boxes, and that they shall be carefully preserved by him until after the next succeeding general election." This would seem to indicate that the poll lists and oaths of inspectors and clerks should be sealed inside the ballot box, and not be returned sealed in a separate package or envelope.

(2) This question is answered in the negative.

(3) There is no statute particularly providing penalty for failure of the inspectors and clerk of an election board to return the poll list of their election district to the supervisor of registration, as contemplated by section 102.44, Florida Statutes, 1941. Section 875.10, Florida Statutes, 1941, provides that "Any officer after being sworn in who wilfully and knowingly neglects, fails or refuses" to perform the duties prescribed in the laws relating to elections, shall be subject to certain stated penalties. The wording would indicate that the statute is intended to cover only those omissions or failures done by such an official "wilfully" or "knowingly."

June 15, 1948.—048-194.

#### SPECIAL PRIMARY—COUNTY TAX COLLECTOR

QUESTION: What procedure should be followed to fill the vacancy in nomination of a democratic candidate for the office of tax collector, the vacancy occurring as result of the death on June 8, 1948, of the democratic candidate for said office duly nominated in the 1948 primaries?

*To Mr. Woodrow W. Melvin, Chairman, Santa Rosa County Democratic Executive Committee, Milton, Florida:*

It appears that Mr. Eugene Glover, the incumbent tax collector of Santa Rosa county, was nominated for reelection in the May primaries, and died on June 8. Opinion No. 046-374, Biennial Report of Attorney General, 1945-1946, page 183, dealing with the subject of filling a vacancy in nomination, is applicable to such a situation.

Elaborating a bit on that opinion, I suggest that in the resolution calling the special primary, the following, among other obviously necessary things, be provided for: (1) the dead-line for qualifying; (2) the time for filing

expense and other statements contemplated by sections 102.57 and 102.59, Florida Statutes, 1941. Our statutes do not seem to cover these matters.

Also, I call attention to the fact that under section 102.27, the executive committee may not require a party committee assessment; however, this would not affect provision for the filing fee contemplated by section 102.31.

May 12, 1948.—048-152.

#### UNOPPOSED CANDIDATE DIES—SPECIAL PRIMARY

QUESTIONS: 1. An unopposed candidate for the office of county school board member died on May 1, 1948. What is the proper procedure to be followed to fill this vacancy in nomination?

2. Can a special primary to fill this vacancy in nomination be held in said county at the time of the holding of the second general primary on May 25, 1948?

*To Honorable G. H. Mears, County Superintendent, Gadsden County, Quincy, Florida:*

The two questions are answered in their numbered order as follows:

(1) Section 102.48, Florida Statutes, 1941, provides in part that, "In the event of the death, resignation or removal of any person nominated for office in the primary election between such primary election and the ensuing general election or if for any cause there is a vacancy in any nomination . . . and no method is otherwise provided herein for filling such vacancy in nomination, then and in that event . . . the county executive committee in the case of a vacancy in a county office, shall call a primary election to provide for a nominee for such office and in case no candidate receives a majority of the votes cast in the primary so called and held, a second primary election shall be held within ten days thereafter." There appears here to be such a "vacancy in nomination" as is contemplated by the section 102.48; and as is apparent, the procedure for filling the vacancy in nomination is clearly set forth in the foregoing quotation.

(2) No reason is apparent why the County Executive Committee of Gadsden county may not, without delay, under provisions of the law mentioned in the preceding paragraph, provide by proper resolution for the holding of a special primary election to fill the vacancy in nomination, the first primary to be held on May 25, 1948, and such resolution to fix the date of the second primary, within ten days thereafter if such is required. Heretofore, in connection with this question, there was delivered to the official to whom this is addressed a copy of my opinion No. 048-150, dealing with special primaries called by the state executive committee. The answer to the third question in said opinion concerning requirement of a separate ballot, election officials and their qualifying to conduct said election, is referred to for guidance here. Among other things, the resolution of the Gadsden County Democratic Executive Committee should fix the last date for qualifying for the office here involved, having in mind time required for printing the ballots; should not provide for a committee assessment (see section 102.27) as distinguished from the filing fee (see section 102.31); and should require the filing of the after-primary statement containing all expenses and other information required and contemplated by section 102.57. Any candidates qualifying should also comply with the requirements of section 102.59.

May 10, 1948.—048-151.

#### SECOND PRIMARY—MAJORITY VOTE REQUIRED

QUESTION: There were three candidates for nomination for the office of member of the County School Board in Lee county in the 1948 primaries. One failed to file his second sworn statement of expense; the

county commissioners failed to delete his name from the ballot at the primary election held May 4 at which said ballot was used. While this disqualified candidate received the smallest number of votes in said primary, sufficient votes were cast for him to prevent either of the other two candidates from receiving a majority of the votes cast. Shall the candidate receiving the highest number of votes in the first primary be declared the nominee or shall there be a second primary between such high candidate and the second high candidate, both being qualified?

*To Honorable H. M. Stringfellow, Chairman, Lee County Commissioners, Fort Myers, Florida:*

In my opinion, the foregoing question is answered as follows:  
Section 102.48, Florida Statutes, 1941, provides in part:

"If any candidate for an office shall receive a majority of the votes cast for such office in the first primary election provided for herein, he shall be declared nominated for such office . . ."

Inasmuch as no candidate in the general primary election held May 4 received a majority of the votes cast for the office mentioned, it is my opinion that none of them can be declared nominated for said office and a second primary election is necessary; hence, both the qualified candidates are required to be voted on at the May 25 second primary.

February 20, 1948.—048-65.

#### COUNTY COMMISSIONER—NOMINATION—COUNTY VOTING

QUESTION: Are candidates for nomination in the primaries for the office of county commissioner in Gilchrist county nominated in pursuance of the requirements of chapter 18545, Laws of Florida, special acts of 1937, or section 102.55, Florida Statutes, 1941?

*To Honorable O. Lamar Crocker, Attorney, Board of County Commissioners, Gilchrist County, Trenton, Florida:*

The request for opinion states that chapter 18545 was submitted to the qualified voters of Gilchrist county in 1937 and was adopted by majority vote. It is here assumed that no other special law or population act applicable to such county changes the provisions of chapter 18545. Since it is not the province of this office to attempt to pass upon the validity of acts under circumstances as here presented, it is further assumed that chapter 18545 is valid legislation. This opinion is conditioned upon such assumptions.

The part of the act pertinent to the above question provides that, "Members of the boards of county commissioners and public instruction of Gilchrist county, Florida, shall be nominated by the qualified electors of said county at large, instead of by districts." Section 102.55, Florida Statutes, 1941, provides, among other things, that, "county commissioners shall be nominated by the several districts of the county instead of by the county at large." It is here noted that the last legislation involving the provisions of section 102.55, other than the acts related to adoption of Florida Statutes, 1941, was chapter 13761, Laws of Florida, acts of 1929. It will be noted that chapter 20719, Laws of Florida, acts of 1941, approving, adopting and enacting Florida Statutes, 1941, specifically provided that local laws were not repealed thereby.

In view of the foregoing, in my opinion the question is properly answered as follows:

\* It appears that candidates for nomination for the office of county commissioner in Gilchrist county shall be nominated in pursuance of the provisions of chapter 18545, Laws of Florida, special acts of 1937.



March 20, 1948.—048-100.

CANDIDATES—BOARDS PUBLIC INSTRUCTION; COUNTY  
COMMISSIONERS—CONSTABLE

QUESTION: How shall candidates for members of Board of Public Instruction, candidates for members of Board of County Commissioners, and candidates for constable be nominated in the coming primary election?

*To Honorable C. B. Hayes, Clerk, Circuit Court, Union County, Lake Butler, Florida:*

I assume that you have no special law for your county concerning this question.

Section 230.08, Florida Statutes, 1941, as amended by section 7, chapter 23726, acts of 1947, provides insofar as material, as follows:

"Each political party holding a primary election during any election year shall nominate one nominee for membership on the county board from each county board member residence district from which a member is to be elected . . . the nomination from each county board member residence district to be by vote of the qualified electors of the entire county."

Section 102.55, Florida Statutes, 1941, provides that:

"County commissioners shall be nominated by the several districts of the county instead of by the county at large."

Section 98.05, Florida Statutes, 1941, provides that:

"... a constable for each justice district shall be elected by the qualified electors thereof. . ."

There is no special statute stating that the nomination of a constable shall be by the voters of the district, but such would necessarily follow; that is, that the qualified electors of the district must nominate the constable therefor.

I feel sure that the sections quoted herein will answer the question.

March 8, 1948.—048-85.

CANDIDATE—AFTER-PRIMARY STATEMENT—QUALIFIED

QUESTION: Is a person who, as a candidate in the 1946 primaries, failed to file his after-primary statement, eligible to qualify as a candidate in the 1948 primaries?

*To Honorable R. E. Davis, Clerk, Circuit Court, Gilchrist County, Trenton, Florida:*

The sections of the law herein referred to are those found in Florida Statutes, 1941.

It is assumed that the statement referred to in the question is that required by section 102.57 to be filed "within ten days after the second primary." However, both that statement and the statement of political workers required by section 102.59 to be filed at the time of the filing of the statement first mentioned are here referred to.

The name of no candidate who fails to file the statements required by section 102.57, "shall be allowed or printed on the official ballot used in the general state and county elections, and no committee, officer or board authorized to issue commissions, certificates of election and certificates of nomination shall issue any such commission or certificate to any candidate who fails to comply with" the provisions of section 102.57 (see section 102.64). Also, section 102.65 fixes a criminal penalty where, upon convic-

tion, any person is found to have wilfully violated any provision of section 102.57.

Section 102.60 prescribes a criminal penalty for any candidate refusing or wilfully failing to obey any of the provisions of section 102.59, and further provides that his name shall not be allowed to be printed on the official ballot "at the next ensuing general election."

It appears that none of the mentioned penalties for failure of a candidate to comply with the provisions and file the statements required by sections 102.57 and 102.59 involve any election subsequent to the general election following the primary election in connection with which such failure occurs. Therefore, in my opinion the failure of a candidate in the 1946 primaries to file any of the statements required by sections 102.57 and 102.59 would not for that reason disqualify such person to qualify as a candidate in the 1948 primaries.

December 23, 1947.—047-427.

#### MINORITY POLITICAL PARTY—SELECTION OF DELEGATES

QUESTION: May the State Executive Committee of a "minority political party," as defined in section 102.71, Florida Statutes, 1941, as amended, select its delegates, including those from congressional districts, to the national convention of such party?

*To Honorable R. A. Gray, Secretary of State:*

The provisions of section 102.71, Florida Statutes, 1941, would seem to furnish the answer to this question. Section 102.71(3) defines a "minority political party," as such term is used in the other parts of the section; and among other things, the section prescribes the manner in which delegates and alternates to the national party convention may be elected by such a political party.

In my opinion, the question is properly answered as follows:

The provisions of section 102.71(1) permit the State Executive Committee of a "minority political party" to elect delegates and alternates to the national party convention to the number permitted any such party from the state at large, provided such mode of selection has been authorized by resolution of such executive committee, as in said subsection provided.

Delegates and alternates of a "minority political party" to such a convention required to be chosen from the congressional districts, may not be selected by the State Executive Committee, but in pursuance of section 102.71(2) may be selected by the respective congressional executive committees of such a party, provided such mode of selection has been authorized by resolution of the State Executive Committee, as in said subsection provided.

It does not appear that the provisions of section 102.72, Florida Statutes, 1941, concerning the election of the national party convention delegates, apply to a "minority political party" as defined in section 102.71, since the provisions of the former section appear to apply to political parties casting more than twenty per cent of the total vote in the last general election.

January 2, 1948.—048-4.

#### MINORITY PARTY—SELECTION OF PARTY DELEGATES

QUESTION: What is "a minority political party," as contemplated by section 102.71, Florida Statutes, 1941, as amended, in view of the provisions of succeeding section 102.72?

*To Honorable R. A. Gray, Secretary of State:*

The term "minority political party," as used in section 102.71 is defined in effect therein (section 102.71(3)) to mean any political party which for two consecutive presidential elections in this state polls a total of not less than five per cent of the total vote cast but which has failed to elect a majority of the electors of president and vice-president of the United States and has failed to elect a governor of Florida. Section 102.71 was originally chapter 22039, Laws of Florida, acts of 1943, as amended by chapter 22678, Laws of Florida, acts of 1945. The mentioned amendment changed only what is now designated section 102.71(3) by adding to the definition therein provided that the minority political party contemplated thereby must have polled not less than five per cent of the total vote cast in the elections mentioned. Chapters 22039 and 22678 were filed in the office of the secretary of state on June 11, 1943, and May 23, 1945, respectively.

Section 102.72(2) provides, in effect, that the delegates to national conventions of political parties casting more than twenty per cent of the total vote in the last previous general election "shall qualify as now or hereafter provided by law for the qualification of other candidates in primary elections." Section 102.72 was originally chapter 22058, Laws of Florida, acts of 1943, as amended by chapter 22729, Laws of Florida, acts of 1945. The mentioned amendment did not affect the part of the original act referred to above in this paragraph. Chapters 22058 and 22729 were filed in the office of the secretary of state on June 11, 1943, and May 26, 1945, respectively.

These laws being in *pari materia* should be construed together if possible. The mentioned 1943 acts and the 1945 acts being passed at the same respective sessions, this rule is invoked with added force. The rule is so recognized that no necessity appears for the citing of authority in support thereof.

In view of the foregoing, in my opinion the question is properly answered as follows:

A "minority political party," as contemplated by section 102.71 is that party defined in section 102.71(3); provided, that any political party casting more than twenty per cent of the total vote in the last previous general election must select its delegates to the national party convention in the manner provided by section 102.72.

January 16, 1948.—048-7.

**MINORITY PARTY—SELECTION OF DELEGATES—DEFINITION OF MINORITY**

**QUESTION:** May a minority political party select delegates to its national convention by its state and congressional committees?

*To Honorable R. A. Gray, Secretary of State:*

In the January 14, 1948, issue of the Tampa Tribune appeared an Associated Press news item containing statements ascribed to Mr. C. C. Spades, chairman of the Republican State Committee. One statement was that, as attorney general, I had given "two opinions within two weeks, one contradicting the other." Since opinion No. 047-427, dated December 23, 1947, and opinion No. 048-4, dated January 2, 1948, supplementary to such first opinion, were in pursuance of your request therefor, and since inquiry may be made of you concerning the same, I consider it proper to further mention such matters to you.

In your request for opinion No. 047-427, you stated you desired a ruling with reference to sections 102.71 and 102.72, Florida Statutes, 1941. I quote further from your letter (combining paragraphs): "The question

is whether a minority political party as defined in our election laws may select its delegates to the national party convention by its state executive committee, and if such election or selection may include the delegates to be chosen from each congressional district. So the question includes the two phases: may the state executive committee of the minority party select their delegates and in such selection will they have to be guided by section 102.72 as well as 102.71." In preparing the opinion, we re-stated the question as follows:

"May the state executive committee of a 'minority political party,' as defined in Section 102.71, Florida Statutes, 1941, as amended, select its delegates, including those from congressional districts, to the national convention of such party?"

After dealing with other phases of the question, we concluded with the following paragraph:

"It does not appear that the provisions of Section 102.72, Florida Statutes, 1941, concerning the election of the national party convention delegates, apply to a 'minority political party' as defined in Section 102.71, since the provisions of the former section appear to apply to political parties casting more than twenty per cent of the total vote in the last general election."

Our opinion No. 048-4 was in pursuance of your letter of December 30, 1947, the effect of which was to ask specifically concerning matters reflected in the question we framed and which is a part of said opinion:

"What is a 'minority political party' as contemplated by Section 102.71, Florida Statutes, 1941, as amended, in view of the provisions of succeeding Section 102.72?"

In such opinion we stated that you inquired concerning a matter dealt with only by inference in the last paragraph of opinion No. 047-427; and properly it should be made clear. The conclusion in opinion No. 048-4 is quoted as follows:

"A 'minority political party,' as contemplated by Section 102.71 is that party defined in Section 102.71(3); provided, that any political party casting more than twenty per cent of the total vote in the last previous general election must select its delegates to the national party convention in the manner provided by section 102.72."

The inference of the conclusion quoted above from opinion No. 047-427 is to the same effect as the conclusion quoted above from opinion No. 048-4. The latter conclusion states in direct language the effect of that which appears in the former conclusion. Certainly, there is no contradiction as between the two opinions.

March 13, 1948.—048-94.

#### MINORITY POLITICAL PARTY—PRESIDENTIAL ELECTORS

**QUESTION:** May a minority political party choose its candidates for presidential electors by its state executive committee, or must they be chosen through primary procedure?

*To Honorable R. A. Gray, Secretary of State:*

Our opinions numbered 047-427 and 048-4, dated December 23, 1947, and January 2, 1948, respectively, in response to inquiries from the secretary of state, dealt with the question of delegates to the national convention of a minority political party, as defined in section 102.71, Florida Statutes, 1941, and involved consideration of succeeding section 102.72. Those opinions relate to other questions and are not controlling with respect to the above question.



Section 102.71(3) defined the term "minority political party." Sections 102.68 and 102.71(1) both deal with the method of nomination of presidential electors of such a party; the term "minority political party" as used in the former section being subject to such definition set forth in section 102.71(3). Since there appears to be no conflict between sections 102.68 and 102.71(1) in relation to the offices here dealt with, the question of priority of enactment is not material.

In my opinion, the question is properly answered as follows:

The State Executive Committee of any "minority political party," as such party is defined in section 102.71(3), has the power, by resolution, to provide that the nomination of presidential electors of such party may be by election in a primary or by election by such State Executive Committee. Hence, whether such nomination is made by the State Executive Committee or in a primary is determined by the aforesaid action of such committee.

April 6, 1948.—048-118.

#### CANDIDATE COUNTY COMMISSIONER—PARTY AFFILIATION

QUESTION: On March 19, 1948, a person filed his qualifying oath for nomination for the office of county commissioner in the 1948 primaries, such oath setting forth that he was a member of the democratic party. Subsequent to the filing of such oath, it developed that when this person had registered, he did not give his party affiliation; and on March 31, 1948, he declared his party affiliation with the registration officer. Is this person properly qualified as a candidate insofar as the matters mentioned are concerned?

*To Honorable J. R. Pomeroy, Clerk, Circuit Court, Martin County, Stuart, Florida:*

There is presented here the question of the right of a person to participate as a candidate in the primary. It is understandable that the request for opinion possibly does not set forth in detail all the facts and circumstances. Whether or not the failure of the record to evidence the party affiliation of this person at the time of registration was the result of inexcusable error on the part of the registration officer, or was occasioned by the failure of the applicant for registration to meet his full requirements as to declaring party affiliation, or resulted because the applicant intentionally did not state any party affiliation, are all pertinent and could easily be the subject of issue. In view of the apparent controversial aspects found here, only a court in proper proceedings and possessed of all the facts could determine the question with finality. Hence, I regret I cannot answer the question. It is suggested that if the issue should be presented to the court, the Martin county case of *State ex rel. Hall vs. Hildebrand, et al.*, 124 Fla. 363, 168 So. 531, might be of assistance.

December 18, 1947.—047-411.

#### CHANGE OF BOUNDARIES—PRECINCT COMMITTEEMEN— ELECTION PRECINCTS

QUESTION: What is the effect of the recent changes in the precinct lines in Pinellas county, as a result of the redistricting of said county, on the present incumbents in the positions of Democratic Executive Committeemen and Committeewomen of Pinellas county?

*To Honorable William B. Tippetts, Chairman, Democratic Executive Committee, St. Petersburg, Florida:*

While this question has never been passed on by our supreme court, the authorities appear to be unanimous that the right to discharge his or her functions by a duly elected committeeman or committeewoman is not affected by a subsequent change of boundary lines which would place the

residence of the committeeman or committeewoman in another precinct. The theory upon which this rule is based is that the redistricting of a county is merely prospective in its operation and in no way affects the right to the office or position of those previously elected. (See *Williamson et al v. Killough, Judge*, (Ark.) 46 S.W. 2d 24, and cases there cited.)

In my opinion, therefore, those committeemen and committeewomen previously elected from old precincts No. 1, 2, etc., are entitled to act as such for the new precincts No. 1, 2, etc., until such time as their successors are duly elected and qualified. Their successors in office would, of course, have to conform to the residence requirements of the statute.

This opinion is in accordance with the opinion of this office, dated September 3, 1946, with respect to the effect on the offices of county commissioners of Volusia county, and of the redistricting of that county.

(See 048-6 which follows)

January 6, 1948.—048-6.

#### CHANGE IN BOUNDARIES—PRECINCT COMMITTEEMEN— TENURE OF OFFICE

**QUESTION:** What is the effect of the recent extensive changes in the boundaries and numbering of election districts in Pinellas county, with respect to the members composing the County Democratic Executive Committee of said county?

*To Honorable William B. Tippetts, Chairman, Democratic Executive Committee, St. Petersburg, Florida:*

From the request for opinion and the aforesaid letter of December 27, 1947, it appears that as result of the redistricting of said county into new county commissioners' districts, it became necessary to effect extensive changes in the boundaries of certain of the election districts, and a different system of numbering of election districts was used. As a result there are new election districts without a committeeman and/or a committeewoman and there are others of these districts where more than one committeeman and/or committeewoman reside.

Our supreme court has never ruled upon this particular question. From authorities from other states, it appears that on the question of the effect of detachment or alteration of a district in which an officer resides, resulting in his change of residence from the district from which elected, two respectable positions may be assumed. One is that when there is such a change in the boundary lines of a district or political subdivision, the change is to be construed as prospective and not affecting the tenure of office of one duly elected from the old district or subdivision prior to change. Directly in point on this, involving party committeemen, see *Williamson, et al. v. Killough, Judge* (Ark.), 46 S. W. 2d 24; and for persuasive authorities (not involving "party" officers) see *State v. Haverly* (Neb.), 87 N. W. 959; *State v. Holden* (Minn.); *State v. Marr* (Minn.), 68 N. W. 8; *State v. Craig* (Ind.), 31 N. E. 352. Another line of authorities (involving public officers elected from districts) is to the effect that a change which places the residence of an officer outside the changed district, results in a vacancy in office. (School district no. 116, etc. *v. Wolf* (Kas.), 98 Pac. 237; *Mauck v. Lock* (Ia.), 30 N. W. 566; *Frazer v. Miller*, 12 Kas. 460.) Among other things, I construe certain of these diverse opinions to turn on the answer to one or the other of these questions:

(1) Does the law require the officer to continue to reside in the district from which elected?

(2) Is the officer elected from the district charged primarily with county duties or duties local to the district he represents?

In view of the foregoing, in my opinion the question is properly answered as follows:

Only our courts in proper proceedings could definitely answer the question here presented; and the remaining remarks hereof are conditioned upon such statement. In the absence of an express statutory provision or decision of our court on this question, it would seem that the question resolves itself into an essentially "party" problem, as distinguished from a "public" matter, and the present responsibility of resolving it devolves primarily upon the party committee involved. The consequences of the determination of the question may be noted as follows:

(1) If it should be decided that the redistricting is to be construed as prospective as to the committee members elected in 1946 (as has been indicated in some jurisdictions), then insofar as such committee members are concerned, the new districts and numbers should be disregarded during the remainder of the terms of office of such committee members, as though such changes had not been made;

(2) If it should be decided that the redistricting is not prospective as to such committee members, (as has been indicated in some jurisdictions in cases involving officers whose duties are primarily local, rather than county-wide) then in those instances where there has resulted change in boundaries of an old district (numbering being of no consequence), either by enlarging or reducing it, or by consolidating one or more districts or parts of districts into a new one, it would appear that vacancies would exist with respect to such new and changed districts, properly to be filled by appointment by the chairman of the State Democratic Executive Committee, under authority of Section 102.07(4), Florida Statutes, 1941.

It is remarked that heretofore, in a somewhat similar situation, I expressed the opinion that this second position was the correct one.

Opinion No. 047-411 is amended to the extent that it is at variance with the matters set forth herein.

January 22, 1948.—048-36.

#### REDISTRICTING—COUNTY COMMISSIONERS

**QUESTION:** About three months ago the county commissioners redistricted Hardee county, Florida, pursuant to article 8, paragraph 5 of the Constitution of Florida, which is implemented by chapter 24108, Laws of Florida, 1947. The county commissioners are not satisfied with this redistricting; they now want to again redistrict the county. Can they do so, and if they do, what effect will this have on a person now living within the boundaries of a certain district, who has paid his qualifying fees to seek the office of county commissioner in his district, if this new redistricting would place his residence in another district?

*To Honorable Ben Coker, Clerk, Circuit Court, Wauchula, Florida:*

Article 8, paragraph 5, as amended in the general election of 1944, says in part:

"There shall be one county commissioner in each of the five county commissioner's districts in each county, which districts shall be numbered one to five inclusive, and shall be as nearly as possible equal in proportion to population. The board of county commissioners in the respective counties shall from time to time fix the boundaries of such districts."

Agreeable to this section of our constitution the county commissioners can again redistrict the county if they think it necessary.

In writing this opinion I assume that the action of the Board of County Commissioners, if they do redistrict the county, will be done in all good faith and solely for the purpose of complying with article 8, paragraph 5 of the constitution.

As a practical matter, too, I would suggest that if any redistricting is to be done, the county commissioners will take into consideration the coming primary election and the fact that section 102.33, Florida Statutes, 1941, requires each candidate for nomination for an office to be voted for wholly within a single county to file his sworn statements, etc., not less than forty-five days previous to the day of the primary election.

That portion of your question here left unanswered is intentionally omitted from this opinion as a decision thereof should be made by the courts.

March 12, 1948.—048-90.

#### REDISTRICTING—LIMITED TIME—DISCRETION OF BOARD

**QUESTION:** Are the county commissioners required to redistrict in so short a time—taking into consideration the fact that if the county is so redistricted there will be four more voting precincts; that the supervisor of registration has already received his books back from the precincts and they are now in his office; that such redistricting will naturally tear up what has already been done with reference to the registration books; that the supervisor of registration would have to order new books from the secretary of state, and that the names of the voters in the new districts would naturally have to be placed in these books—that confusion might result in an illegal election?

*To Honorable James W. West, County Attorney, Sumter County, Bushnell, Florida:*

I am not unmindful of the duty imposed upon the county commissioners to redistrict their county into districts which shall be as nearly as possible equal and proportional to the population and that this duty is a continuing one. (Article VIII, section 5, Constitution of Florida, as amended by the general election of 1944.)

On the other hand, the county commissioners are charged with other duties fully as important—such as, to avoid a change in district lines at a time so near the primary election as reasonably might so materially affect the primary election processes as to deny or abridge the right of a qualified elector to vote for national, state and county candidates at such election, other than candidates for the office of county commissioner who might be affected.

The facts set forth in the question are taken from the request for opinion. I have no personal knowledge of such facts and express no opinion. Whether or not between now and the date of the first primary there could be effected a redistricting of the county as contemplated, and whether there would remain sufficient time for the preparation of the registration books and the preparation and printing of the ballots for the primary, is a matter I cannot decide. That would depend upon the time reasonably required by the board to redistrict the county in the manner prescribed by our constitution, the changes which might be required as to election districts, and the time remaining thereafter before the first primary.

Since I am not familiar with these factors and circumstances, I cannot give a definite answer. However, I know your board must be intimately familiar with the situation there; and if in their fair judgment a redistricting of the county prior to the primary might interfere with the election processes to the extent of depriving any elector of the right to vote in such primaries, the board may defer action, if any action is needed, with respect to such redistricting until after the primaries are held.

I trust this answers the question.



May 19, 1948.—048-169.

OMISSION—PRESIDENTIAL ELECTORS—ABSENTEE BALLOT

**QUESTION:** In order that persons who expected to be absent from Highlands county on election day might be permitted to vote in the manner and during the period prior to the 1948 second primary, as provided by section 101.07, Florida Statutes, 1941, ballots were printed and voted which did not contain the names of certain candidates for the office of presidential elector, all other candidates' names appearing thereon. Will the discrepancy in form thus occasioned between such ballots used for absent voting and the official ballot used on election day render such absentee ballots invalid?

*To Honorable M. R. McDonald, Attorney, Board of County Commissioners, Highlands County, Sebring, Florida:*

It is here assumed that the only difference between these two sets of ballots is that such candidates for presidential electors are omitted from the absentee ballots.

Sections 101.07 and 101.08, Florida Statutes, 1941, contemplate that ballots used for absentee voting under said sections shall be "in all respects identical with the official ballot." While the law quoted seems to be clear on this point, under the circumstances here presented, in the absence of a court order holding said absentee ballots invalid, in my opinion the election officials should treat and consider such absentee ballots so voted as valid ballots.

July 2, 1948.—048-225.

COUNTY BUDGET COMMISSION—ST. LUCIE COUNTY—SPECIAL  
ELECTION PARTY NOMINATION

**QUESTION:** Does the duty devolve upon the governor, or is he authorized, to call a special primary election for nomination of party candidates for the offices of members of the County Budget Commission of St. Lucie county, in the 1948 general election?

*To Honorable Millard F. Caldwell, Governor:*

The St. Lucie County Budget Commission was created by chapter 24866, Laws of Florida, acts of 1947. A part of section 2 of the act provides that the commission shall be composed of five registered voters who shall be freeholders and more than 30 years of age, residents of the county for not less than five years, and that no two members of the commission shall be residents of the same county commissioner's district. There is a further provision that "The members of the county budget commission shall be elected by the voters of the county at large, but the first members of the commission shall be appointed by the governor, when this act shall take effect, to hold office until the first Tuesday after the first Monday in January, succeeding the time to which this law shall become effective in said county. The first election of budget commissioners shall be held at the general election preceding the expiration of the terms of office of any of the said commissioners appointed hereunder; and those elected in the first election hereunder from the even numbered county commissioners' districts shall be elected and serve for two years, and those elected from the odd numbered county commissioners' districts shall be elected and serve for four years."

Section 18 of the act provides that the same shall take effect immediately upon becoming a law and that the governor should immediately thereafter appoint a budget commission of said county. Section 19 of the act provides that upon passage of the act and its becoming a law, the act, before taking effect, should be ratified and approved by a majority of those qualified electors of said county voting at the next general or special election held in the county, at which time the provisions of the act should be submitted to the people for their ratification or rejection.

Copy of resolution of the Board of County Commissioners of said county attached to the request for opinion recites that said act became effective by ratification or approval of a majority of qualified electors of said county voting in the state democratic primary, held on May, 1948. Section 1 of the resolution requests the governor to make an order in compliance with section 98.10, Florida Statutes, 1941, declaring that a special democratic primary election be held in said county on Tuesday, September 7, 1948, for the nomination of members of the County Budget Commission of St. Lucie County, Florida, to be voted upon for election in the next general election.

In view of the foregoing, in my opinion the question is properly answered as follows:

There is nothing in chapter 24866, nor do I find anything in any other laws of the State of Florida, which authorizes the governor of this state to call a special primary election for the purposes set forth in the question. It is remarked that section 98.10 referred to in the aforesaid resolution concerns special elections for the filling of offices as distinguished from primary elections for the nomination of candidates.

Without going into the question any further, it is remarked that the matter of the furnishing of candidates by political parties to run for the offices concerned in the 1948 general election appears to be a party matter. If the appropriate executive committee of any interested political party desires information or advice concerning whether or not such party candidates may be provided and the method of doing so in connection with the 1948 general election, request for such advice will be given attention when it is received.

June 7, 1948.—048-189.

#### STATE CANVASSING BOARD—ERROR IN COUNTY REPORT

**QUESTION:** The Jackson County Canvassing Board in its certificates to the State Canvassing Board of the votes cast for the candidates for the party office of delegates to the National Democratic Convention from the third congressional district in the first primary, set forth that in said county Mary Lynn Acker, one of such candidates, received 4049 votes; and the State Canvassing Board in its canvass of returns for said office included said figure in its computation. The secretary of state is now informed that such vote for said candidate in said county was 449, the figure of 4049 as certified being purely a typographical error. In the event the Jackson County Canvassing Board shall reconvene and send in corrected certificate showing that such candidate received 449 votes, should the State Canvassing Board reconvene for the purpose of considering the corrected return, and making an amended determination and declaration concerning the candidate elected as shown by the total vote cast for candidates for said office?

*To Honorable R. A. Gray, Secretary of State:*

It has been ascertained by inquiry at the office of the secretary of state that if the State Canvassing Board considers an amended certificate concerning the party office involved from the named county board, and accepts the corrected figure of 449 as the votes cast in said county for Mrs. Acker, the result will be the state board's determination and declaration that a candidate other than Mrs. Acker was elected to the office involved.

In view of the foregoing, in my opinion the question is properly answered as follows:

It would seem reasonable that the Jackson county board should correct the obvious error concerning the votes cast for Mrs. Acker, as herein related. Upon receipt of an amended certificate from said county board reasonably it appears that the state board should reconvene and consider said amended certificate, and thereupon determine and declare the results of the election with respect to the office involved, in the light of the corrected showing of the vote in Jackson county, as aforesaid.

June 2, 1948.—048-184.

#### CANVASSING BOARD—ATTORNEYS' FEES

**QUESTION:** Under chapter 22119, acts of 1943, two candidates for county commissioner received the majority county-wide votes but neither received a majority of the votes in the district in which he lived and for which he made the race. The two defeated candidates in order to test the constitutionality of said act have instituted mandamus proceedings against the County Canvassing Board to recanvass the returns of said first primary election and declare the said defeated candidate the nominee upon the majority of votes received in the respective district. The two candidates who received the majority of county-wide votes insist that the county pay their attorneys' fees in connection with said mandamus suits against said county canvassing board. Would it be permissible and valid for the county, through its board, to pay said attorneys' fees and would it be permissible and valid to also pay the attorneys' fees of the contestants?

*To Honorable H. Rider, County Attorney, Hendry County, LaBelle, Florida:*

It is my opinion that the county commissioners have no authority to pay the attorneys' fees for the defeated candidates or any of the candidates mentioned in the question. Should the County Canvassing Board require the services of counsel, in my opinion the county commissioners would have authority to pay a reasonable fee for counsel representing the canvassing board. The Canvassing Board, in canvassing the results of the primary election, is acting for a county purpose and if the board requires the services of an attorney for protection in exercising such powers, the payment of a reasonable fee to such attorney is for a proper county purpose.

September 3, 1948.—048-291.

#### NOMINEE DIES—PROCEDURE FOR FILLING VACANCY

**QUESTION:** The democratic nominee in the 1948 primaries for the office of justice of the peace for district No. 3, Escambia County, Florida, has recently died. What steps are required to be taken by the county Democratic Executive Committee to fill this vacancy in nomination?

*To Honorable R. G. Ward, Chairman, Escambia County Democratic Executive Committee, Pensacola, Florida:*

Section 102.48, Florida Statutes, 1941, provides, in part, that, "In the event of the death, resignation or removal of any person nominated for office in the primary election between such primary election and ensuing general election, or if for any cause there is a vacancy in any nomination . . . and no method is otherwise provided herein for filling such vacancy in nomination, then and in that event . . . the county executive committee in the case of a vacancy in a county office, shall call a primary election to provide for a nominee for such office and in case no candidate receives a majority of the votes cast in the primary so called and held, a second primary election shall be held within ten days thereafter." There appears here to be such a vacancy in nomination as contemplated by section 102.48.

To provide for the holding of such special primary, the county executive committee should convene in duly called session and by resolution call a special primary to fill such vacancy in nomination. Laws governing primary elections should be followed as closely as possible, but obviously the resolution should provide specially in instances where those laws, because of the time element, cannot be followed.

My opinion of September 4, 1946, No. 046-374, in a general way, covers the matter of holding a special primary election under section

102.48, in cases of this kind. Attention is also invited to opinions numbered 048-150 and 048-152, which deal with special primaries held under section 102.48. These opinions are supplemented by the following further remarks:

In fixing the date of the special primary, the resolution should provide a date far enough in advance for a public notice of the election to be given and for the time limit within which candidates may qualify. The resolution might well provide that candidates shall qualify by filing with the clerk of the circuit court by 12 o'clock noon on the last day to qualify the candidate's oath in the form set forth in section 102.29, Florida Statutes, 1941, and the payment to said clerk of the filing fee required by section 102.31, Florida Statutes, 1941. (As remarked in opinion No. 048-150, it seems that under section 102.27, the party may not assess a committee assessment in the event of a special primary.)

The resolution should provide the time or times within which candidates in said primary shall file expense statements. Under section 102.57, which relates to the regular primaries, a first expense statement is required not more than 30 nor less than 25 days prior to the first primary; a second statement not more than 12 nor less than 8 days prior to the first primary, and an after-primary statement within ten days after the second primary. It is anticipated that because of the time element the qualifying date fixed would be less than 25 days prior to the day of the primary election. If such qualifying date is more than 12 days before the primary, it is suggested that the resolution provide for the filing of an expense statement containing the matter required by section 102.57 not more than 12 nor less than 8 days prior to the primary and that a second statement be filed within ten days after the second primary, or, if no second primary is required, within ten days after the date fixed in the resolution for the second primary; and also at the time of the filing of the last statement, that the statement under oath required by section 102.59 be filed by candidates in said election. If the qualifying date fixed by the resolution is less than 12 days before the date set forth for the primary, then it is suggested that the resolution provide only for the after-primary statement and the statement required by section 102.59.

It will be noted that in said opinion No. 048-150, reference is made to two resolutions of the State Democratic Executive Committee, one of which provided a special primary to obtain a candidate for the office of judge of the sixth judicial circuit. A copy of that resolution may be of benefit to the Escambia County Committee in preparing their resolution. It is particularly noted that said state committee resolution made no provision for filing of expense statements or for notice of election, and also that such resolution erroneously provided for a committee assessment.

After adoption of the resolution, certified copies thereof should be delivered to the clerk of the circuit court and the Board of County Commissioners of Escambia county for their information and necessary action in connection therewith.

If additional information is required, further inquiry concerning the matter will receive prompt attention.

October 6, 1948.—048-320.

#### DEATH OF NOMINEE—POWERS OF EXECUTIVE COMMITTEE

QUESTION: Where a vacancy occurred by death on September 19, 1948, of a democratic nominee for justice of the peace, and County Democratic Executive Committee called a special primary election, pursuant to section 102.48, and requested the county commissioners to hold said special primary election to fill the said vacancy, and the county com-



missioners, by resolution dated September 30, 1948, refused to hold such special primary election, does the Democratic Executive Committee have authority to select a nominee to fill said vacancy?

*To Honorable Chas. F. Slater, Chairman, Pasco County Democratic Executive Committee, Zephyrhills, Florida:*

By Section 102.48, Florida Statutes, 1941, it is provided that "... if for any cause there is a vacancy in any nomination or in any office and no method is otherwise provided herein for filling such vacancy in nomination, then and in that event ... the County Executive Committee, in the case of a vacancy in a county office, shall call a primary election to provide for a nominee for such office, and in case no candidate receives a majority of the votes cast in the primary so called and held, a second primary election shall be held within ten days thereafter. . . ."

Agreeable to the aforesaid section the County Democratic Executive Committee did call for such primary election; the county commissioners, in September 30, 1948, refused to hold same, and it now develops that the general election of 1948 will be held within less than thirty days from this date, due to no fault, so it appears, on the part of the Democratic Executive Committee.

It is further provided by said section 102.48 as follows:

"Should a vacancy occur in any nomination for county office . . . , less than thirty days before a general election . . . , then and in that event, the county executive committee . . . shall fill such vacancy in nomination by selecting a nominee for such office."

The Democratic Executive Committee, having done all that it could to fill the nomination by a special primary election and the officers charged with holding such election having refused to so hold—and it now develops that a general election will be held in less than thirty days—in my opinion the Democratic Executive Committee shall, and it is its right to select a nominee to fill the said vacancy.

October 6, 1948.—048-319.

#### OPENING OF LOCKED BALLOT BOXES

**QUESTION:** When the registration books, both original and copies, have, through error, been locked up in the ballot boxes by the managing board of a certain precinct at two different primary elections, what procedure is necessary to recover the registration books?

*To Honorable Eva Baker, Supervisor of Registration, Liberty County, Bristol, Florida:*

It can be readily seen that the officials, charged with conducting said primary elections, mistakenly locked the registration books in the ballot boxes, as the law does not contemplate or require such books to be locked therein. (Section 102.44, Florida Statutes, 1941.)

Inasmuch as it is the duty of the supervisor of registration to maintain registration books open during the period required by law—and it appears from the request for opinion that registration books now required to be kept open are locked in such boxes, as aforesaid—in my opinion such supervisor of registration is authorized and should open the locked boxes involved, remove the required registration books, being careful not to disturb anything else in such boxes, and re-seal such boxes. At the time the supervisor goes into such boxes, removes books, and re-seals same, there should be present witnesses to her acts with respect thereto.

## BOND ELECTIONS

August 13, 1948.—048-272.

## FREEHOLDER—REGISTRATION

QUESTIONS: 1. What is the period of time during which persons may register to vote in an election in Manatee county to determine the question of issuance of bonds for a county hospital?

2. What constitutes a "freeholder" under our constitution and statutes with respect to such a bond election?

3. What duty devolves upon the supervisor of registration to determine whether or not a qualified elector is a freeholder for the purpose of such election?

*To Honorable Lendell Sharer, Supervisor of Registration, Manatee County, Bradenton, Florida:*

The request for opinion states that it is expected a special election will be called in Manatee county within the next sixty days for the purpose of determining the question of the issuance of bonds for a new county hospital. In the absence of further details in such request, the following are assumed to be true and this opinion is conditioned upon such assumptions: (1) that the proceedings for issuance of such bonds for the purpose stated are in pursuance and under authority of chapter 155, Florida Statutes, 1941; and (2) that the general registration laws of the State of Florida are applicable in Manatee county, as distinguished from any special or population acts. Should these assumptions, or either, be incorrect, the request for opinion should be renewed with more detailed statement.

Conditioned upon such assumptions, it appears that with respect to the bond election contemplated, chapter 103, Florida Statutes, 1941, as amended, must be looked to for certain duties of the supervisor of registration.

In my opinion the questions posed are answered in their numbered order as follows:

(1) Section 103.05 provides for a special registration of electors who are freeholders, the registration books to be opened for a special registration for such bond election, to close not later than five days before the holding of such election. The purpose of this special registration is to permit freeholders otherwise qualified to register to vote in such election, during a period when under the general law the registration books are closed.

If it should happen that during the period from the date of the calling of the bond election up to five days before the date of such election, the registration books are open in pursuance of law for registrations for the general election, the necessity for the special registration provided by section 103.05 ceases to exist; and it is pointed out that with respect to the general registration of electors, section 98.12 provides a method whereby a registrant should evidence to the registration officer and for the purpose of the record, whether or not he is a freeholder. If during said entire period the registration books are so open, only those electors who are freeholders who register not later than five days before the holding of said election may properly vote in said election.

Freeholder registrants who are qualified to vote in the general election and who previously so registered, are qualified to vote in said bond election.

It may be that during the period between the calling of such election and up to five days before the holding thereof that the general registration books will not be open for general registration, or will be open only a part of such time. It is the intent of section 103.05 that in any event such books shall be open up to five days before the date of the bond election. However, any registration made in the books for the bond election and at

a time when otherwise under the law the books are not open, shall be so made and entered in the books separate and distinct from other registrations and should indicate that they are made for the purpose of the registrant's voting in such bond election. (For this and other information, see opinions numbered 046-121, 047-282 and 047-283.)

(2) Only freeholders who are qualified electors may participate in such bond election. (See section 6, article 9, Florida Constitution; and such is provided in and contemplated by chapter 103.) Section 103.14 defines a "freeholder": "For the purpose of this chapter any person shall be deemed to be a freeholder who has an immediate beneficial ownership interest, legal or equitable, in the title to a free simple estate in land."

(3) Section 103.06 contemplates that in an election of this nature, the county commissioners shall cause to be made up and certified by the registration officer a list of the names of qualified electors appearing on the registration books who are determined to be freeholders residing in the county, and who are also determined to be qualified to vote in the bond election; and that certified copies of such list shall be furnished the inspectors and clerks of the election of each voting precinct. This section further provides that in making up said list, such investigation shall be made as will warrant the conclusion that all names appearing on said list are qualified to vote in said bond election.

Only those freeholders who are qualified electors and who are shown to be such by the registration books under registrations made during the special registration provided by sections 103.03-103.05, or under registrations otherwise made as aforementioned, are qualified to vote in such election. In making up such list of those qualified to vote in said election, the registration officer should be guided by the sentence immediately preceding; provided, that he should consider the names of those appearing on the registration books as freeholders. If the registration officer has reason to doubt that any such person is not a freeholder at the time of the making of such list, he should make reasonable inquiry to ascertain their status. If the registration officer ascertains that at any time prior to five days before the bond election any such persons ceased to be freeholders, their names should not be included in such list. (Reference is also made to aforesaid opinion No. 047-282.)

If further information is required, a request therefor will be given prompt attention.

August 29, 1947.—047-283.

#### PORT BOND ELECTION—OPENING OF REGISTRATION PRECINCTS

QUESTIONS: 1. If the Canaveral Port Authority should call an election to determine the question of the issuance of bonds by the Canaveral Port District, and in connection with such formal action taken direct the supervisor of registration to open the registration books for the registration therein for said election of freeholders who are otherwise qualified electors residing in said district, should such supervisor comply with said request?

2. If such books are opened for said purpose, is the supervisor permitted to send the proper precinct books to the respective district registration officers for the purpose of such registration?

3. If such books are opened for said purpose, when should they be closed?

*To Honorable W. J. Bailey, Supervisor of Registration, Titusville, Florida:*

The Canaveral Port District was created and functions in pursuance of chapter 19716, Laws of Florida, acts of 1939, as amended by chapter 21139, Laws of Florida, acts of 1941; chapter 23199, Laws of Florida, acts

of 1945, and chapter 24403, Laws of Florida, acts of 1947. To the extent and for the purposes set forth in said laws, the port authority, governing body for said district, may issue revenue bonds or revenue certificates of said district. It is here assumed that under the provisions of applicable law the circumstances under which it is contemplated that such bonds shall be issued require that the question of their issuance must be decided by the freeholders who are qualified electors residing in such district in an election called and held for that purpose in pursuance of law.

The responsibility of determining the provisions of law governing the proper calling and holding of such election devolves upon the governing body of the district; and any such election will be held in pursuance of formal action of the port authority, as provided by law.

In view of the foregoing, in my opinion the questions are answered in their numbered order, as follows:

(1) If the port authority in connection with its formal action in calling such election shall determine that the registration books of said county should be opened to permit freeholders who are otherwise qualified electors residing in said district to register therein, in pursuance of the provisions of sections 103.03 and 103.05, Florida Statutes, 1941, to vote in said election, and shall direct the supervisor of registration to open the proper registration books for that purpose, said officer should comply with such direction and request. Registrations so made for said election during the period said books are open for such purposes, in pursuance of said sections 103.03 and 103.05, shall be entered in said books separate and distinct from other registrations therein, and clearly indicate that such registrations are for the purpose of the registrants voting in the aforesaid district bond election only; and any certificate, receipt or other written evidence which may be issued in connection with such a registration shall clearly indicate that such registration is for the purpose of permitting the registrants to vote in said district bond election only.

(2) There appears to be no authority of law for the sending of precinct books to the district registration officers for the purpose of such special registration.

(3) Said section 103.05 provides that registration books opened for such an election "shall close not later than five days before the date of holding of said election."

Should the proposed election be held prior to March 1, 1948, the registration books referred to, supra, are not the new books contemplated by chapter 24116, Laws of Florida, acts of 1947, but are the old books hitherto used in Brevard county.

July 28, 1947.—047-236.

#### DISTRICT REGISTRATION—BOND ELECTION

**QUESTION:** Would it be proper for the supervisor of registration of Pasco county to deliver registration books to district registration officers in precincts in a school district for the purpose of the registration therein of electors otherwise qualified to vote in a bond election in such school district?

*To Mrs. Dove C. Falls, Supervisor of Registration, Dade City, Florida:*

It is assumed that the registration of electors in Pasco county is governed by the general laws of Florida relating to registration of electors, and this opinion is conditioned upon such assumption.

In the event of such an election, the registration books shall be opened for the registration of freeholders who are qualified electors residing in such school district, and such books shall close "not later than five days before the date of holding such election." (Sections 103.03 and 103.05,



Florida Statutes, 1941.) Also see *State vs. Special Tax School Dist. No. 6 in Polk County, et al.* (Fla.), 8 So. 2d 658.

Said section 103.03 provides, further, that electors for such an election "may be registered as provided by the general laws of this state for registration of electors."

The general laws of Florida relating to registration for general elections provide for district registration officers in the several precincts (section 98.15, Florida Statutes, 1941). The manner of registration is controlled entirely by statute, and the periods of time when district registration officers may register electors in their respective districts are specifically set forth in our laws. (See sections 98.22 and 102.09, Florida Statutes, 1941.) Permitting the registration of electors by district registration officers in their respective districts other than in pursuance of specific statutory authority would be gravely questionable. There appears to be no specific law authorizing registration for a district school bond election by district registration officers in their respective districts.

In view of the foregoing, in my opinion, the question is properly answered as follows:

While sections 103.03 and 103.05, Florida Statutes, 1941, provide for registration for a school district bond election, as indicated, *supra*, there appears to be no statutory authority for the delivery of registration books to district registration officers for the purpose of such bond election registration. In other words, it would appear that persons desiring to register for such an election should present themselves at the office of the supervisor of registration if they are not already registered in the general registration books.

September 15, 1947.—047-298.

#### FREEHOLDERS—PASCO COUNTY—REGISTRATION OF VOTERS

QUESTION: May the registration books provided by chapter 24260, Laws of Florida, acts of 1947, be used to determine who are freeholders otherwise qualified to vote in a school district bond election to be held in Pasco county prior to January 1, 1948?

*To Mrs. Dove C. Falls, Supervisor of Registration, Dade City, Florida:*

Chapter 24260, Laws of Florida, acts of 1947, provides for the registration and reregistration of all voters in Pasco county who intend to qualify for voting in any primary, general or special election to be held in the year 1948 and subsequent years. Under the act, persons possessing the legal qualifications to become registered voters may register or reregister now in the books contemplated by the act, but such registration or reregistration in said new books for the purpose of voting does not become effective until January 1, 1948.

Thus, if said school district bond election is held prior to January 1, 1948, only those persons who are duly registered freeholders residing in said school district according to the registration books hitherto used in said county, or who are specially registered for said election in pursuance of sections 103.03-103.05, Florida Statutes, 1941, may vote in such school district bond election. Hence, the question is answered in the negative.

September 6, 1947.—047-282.

#### FREEHOLDER—CHANGE IN REGISTRATION—DUTIES OF REGISTRATION OFFICER

QUESTIONS: 1. May a person who has previously registered as a "non-freeholder," but who has obtained title to real property subsequent to his registration, have such change noted in the registration books with-

out personal appearance before the supervisor of registration, to qualify him to vote in a school bond election in Polk county, Florida?

2. Is it permissible to make such change upon the registration books upon oral application of the voter or should he be required to sign an affidavit that he is a freeholder?

3. Granted that such change is not permitted except by affidavit, may the affidavit be made before a notary public "in the district" or must it be made before the supervisor of registration?

*To Honorable Hugh E. Carlton, Supervisor of Registration, Polk County, Bartow, Florida:*

It is assumed that under the registration laws applicable to Polk county, during the period for registration contemplated by the foregoing questions, the registration books of said county are closed other than for the special registration contemplated by sections 103.03-103.05, Florida Statutes, 1941. It is further assumed that no local or population act applicable to Polk county impairs the application in said county of sections 98.12 and 103.03, Florida Statutes, 1941. This opinion is conditioned upon such assumption.

Sections 98.12 and 103.03, Florida Statutes, 1941, provide methods whereby a registrant may evidence to the supervisor of registration that he is a freeholder. Both of these sections were parts of chapter 14715, Laws of Florida, acts of 1931. The former of these sections provides that at the time any person applies for registration at any general, special or primary election, the supervisor of registration, shall require the applicant to state "under oath or affirmation" whether or not such person is a freeholder, and such officer shall record the same upon the registration book. The latter of these sections provides for special registration for a bond election, and requires the applicant for registration to "submit proof by affidavit before the registration officer" that he is a freeholder who is a qualified elector, etc. Under either of said two sections, if the registration books evidence that a person is a freeholder and otherwise a qualified elector, he may vote in such an election (see section 103.04, Florida Statutes, 1941).

The foregoing quoted words from section 103.03 are ambiguous. Certainly, it is contemplated that the registrant desiring to submit such proof as required, must do so in person before the registration officer. There are other instances in our registration laws when a applicant for registration must make statements under oath in connection therewith, and in each instance such statement under oath is made before the registration officer as distinguished from any other officer authorized to administer oaths (see sections 98.11, 98.12 and 102.21, Florida Statutes, 1941). It is not thought that the Legislature in the enactment of said chapter 14715, particularly that part now designated as section 103.03, intended to prescribe a different rule respecting the officer before whom the proof required by said section should or could be made. Granting that such was not the legislative intent, then it would appear that reasonably such quoted words are to be construed as meaning that the applicant for registration must submit proof by affidavit made before the registration officer that he is a freeholder. "Before" ordinarily means "in the presence of." (State vs. Murnane, 172 Minn. 401, 215 N. W. 863; Ex parte Davis, 333 Mo. 262, 62 S. W. 2d 1086.) "Affidavit" means a sworn statement in writing. (2 Words and Phrases, 641, 653.)

In view of the foregoing, in my opinion the questions are properly answered in their numbered order, as follows:

(1) This question is answered in the negative.

(2) Where a person previously registered as not a freeholder, and during the period of time the registration books are open for the special registration provided by section 103.03 wishes to qualify as an elector who is a freeholder, he should meet the requirements of section 103.03, and proof that he is a freeholder should be by affidavit as prescribed in said section.

(3) It is assumed that the affidavit before a notary public contemplated by this question means the making of such an affidavit before a notary at a place which is not in the presence of the registration officer. Until our courts have construed the words "they shall submit proof by affidavit before the registration officer," as the same are used in section 103.03, caution dictates that such affidavit be made before the registration officer.

September 26, 1947.—047-315.

#### REGISTRATION OF VOTERS—TIME FOR CLOSING BOOKS

QUESTIONS: 1. At what time should the registration books of Polk county be closed for the registration of electors otherwise qualified to vote in the biennial school district trustee election to be held in 1947 in said county?

2. At what time should the registration books of Polk county be closed for the registration of electors otherwise qualified to vote in a bond election to be held in special tax school district No. 4 in said county prior to January 1, 1948?

*To Honorable Hugh E. Carlton, Supervisor of Registration, Polk County, Bartow, Florida:*

According to volume III, Florida Statutes, 1941, prior to the 1947 session of the Florida Legislature, three acts specially applicable to Polk county related to registration of electors therein, viz., chapters 20641 and 20797, Laws of Florida, acts of 1941, and chapter 22201, Laws of Florida, acts of 1943. Neither chapter 23903, Laws of Florida, acts of 1947, if applicable to Polk county, nor chapter 23943, Laws of Florida, acts of 1947, appear to affect the foregoing questions now.

Chapter 20641 would seem to provide that all registration shall be in the primary registration books of said county. Under said act, the books close "on the first Monday in April preceding the primary election," then open "the day next following the official county canvass of the primary election, or elections," remain open "until the second Saturday in October preceding the general election," and are "closed for registration until the next day following the official county canvass of the general election." The law further provides that, "In the case of any special election, such registration books shall be opened in the office of said supervisor of registration for registration of electors in said county in the same manner as is now prescribed by law, but shall be closed twenty days prior to any special election and until the next day following the county canvass of such special election."

It is doubtful that technically a regular biennial school trustee election, provided by law in pursuance of our constitution, is a "special election," yet, in view of the wording of said chapter 20641, respecting the times when such books shall close preceding an election, it is my opinion that a school trustee election is included in the term "special election" as such words are used in said chapter.

With respect to the bond election referred to in the second question above, the special registration contemplated by section 103.03-103.05, Florida Statutes, 1941, is to be observed in Polk county. On this point see *State v. Special Tax School District No. 6, in Polk county, (Fla.)*, 8 So. 2d. 658.

In view of the foregoing, in my opinion the questions are properly answered in their numbered order as follows:

(1) The registration books of Polk county shall close for the registration of electors otherwise qualified to vote in the school trustee election described in the first question above "twenty days prior to" said election.

(2) The books shall be kept open to permit the special registration contemplated by said sections 103.03-103.05 of electors otherwise qualified

to vote in such special tax school district bond election described in the second question and "shall close not later than five days before the date of holding said election;" provided, that such registration so made for said election between "twenty days prior to" said election and the date such books shall close as provided by said section 103.05, shall be made and entered separate and distinct from other registrations and shall clearly indicate that such registrations are for the purpose of such registrants voting in said bond election only.

September 17, 1948.—048-313.

#### REGISTRATION FOR BOND ELECTION—BROWARD COUNTY

**QUESTION:** Will it be necessary for the supervisor of registration of Broward county to close the registration books for the entire precinct five days before the bond election described below?

*To Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Ft. Lauderdale, Florida:*

It appears from the request for opinion that on October 5, 1948, an election is to be held in Old Plantation Water Control District in Broward County on the question of issuance of water control bonds of said district. Said district lies within the boundaries of precinct No. 17 of such county.

For information concerning Old Plantation Water Control District, reference is made to chapter 24416, Laws of Florida, acts of 1947.

Chapter 24216, Laws of Florida, acts of 1947, is a comprehensive registration act for Broward county. Without casting doubt upon the validity of such act, it is stated that it is not the province of this office to consider the legal sufficiency of such act; and it is specifically noted that this opinion is conditioned upon the validity thereof.

Section 10 of chapter 24216 provides, among other things, that, "all official registration files and records to be used in such elections shall be closed during a continuous period of thirty (30) days immediately preceding any general, primary, special, bond, school trustee or school bond election and shall remain closed for five days after any election." This contemplates thirty clear days for the books to be closed between the last day the books are open and the election day. Section 11 of the act provides, among other things, that the registration books shall be open in the office of the supervisor during the period they are open in the sub-offices, and "they shall close for registration of electors at 5 p.m. on the 30th day before any general, primary, special bond, school bond elections, etc." This wording in section 11 calls for the application of the general rule of counting back thirty days, excluding the election day and including the last day of the court, which is at variance with the quoted provision of section 10. Taking into consideration the rules of statutory construction and the rights of electors involved, it would seem that the closing of the books should be controlled by the provisions of section 11.

Sections 16 and 17 of chapter 24216 provide, in effect, that all general registration laws of the state not inconsistent or in conflict with the act were adopted as parts of the act, otherwise repealed.

Sections 103.03-103.05, Florida Statutes, 1941, provide for registration of freeholders otherwise qualified to vote in bond elections as contemplated therein, and specifically states (section 103.05) that "no elector shall be registered as provided within less than five days prior to the date of holding any bond election, it being the intention of this provision that the special registration of electors provided for shall close not later than five days before the date of holding said election." The quoted wording in chapter 24216 concerning "bond" and "special bond" elections is clear and explicit and would seem to collide with the five-day feature quoted from section 103.05. The Florida Supreme Court in the case of *State v. Special Tax School District No. 6 in Polk County (Fla.)*, 8 So. 2d. 658,



had before it the question of whether or not a provision of chapter 20641, Laws of Florida, acts of 1941, stating that the registration books in Polk county "shall be closed twenty days prior to any special elections," superseded the five-day feature mentioned in section 103.05. The court held in that case that the quoted provision of chapter 20641 did not supersede section 103.05. It is here frankly stated that whether or not the thirty-day feature in the Broward county act or the registration features of 103.03-103.05 controls as to constitutional bond elections is a judicial one; but as indicated heretofore in this opinion, this office cannot deal with that question with finality; hence, in the absence of court adjudication, for present purposes the statute controls.

The thirtieth day prior to October 5, 1948, date of the aforementioned bond election, is Sunday, September 5, 1948. Section 10 of chapter 24216 excludes Sundays and holidays from the time during which the books are required to be kept open. Hence, it would appear that for the purposes of the bond election, the books closed at 5 p. m. on Saturday, September 4, 1948 (see section 11 of the act). The thirtieth day prior to the 1948 general election is Sunday, October 3, 1948; and following the reasoning set forth in this paragraph, it would appear that under sections 10 and 11 of the act, the books shall close preceding the general election at 5 p.m., October 2, 1948. It does not seem reasonable that chapter 24216 should be construed to require that the books in precinct No. 17 of Broward county should be closed for all registration purposes approximately sixty days prior to the 1948 general election because of this bond election.

In view of the foregoing, in my opinion the question is properly answered as follows:

Conditioned as set forth, *supra*, it would seem that only those persons who are shown by the registration books and records of Broward county to be freeholders and registered electors in Old Plantation Water Control District when such books closed for said election on September 4, 1948, as aforesaid, and who on the date of such election are such registered electors who are freeholders, are qualified to vote in said bond election; but for all other purposes, the registration books should remain open to permit persons in said precinct No. 17 to register up to 5 p.m., October 2, 1948.

## CHAPTER IX

### OFFICES, OFFICERS AND RECORDS

#### PERSONS ELIGIBLE TO OFFICE; RETIREMENT; EXPENSES

December 11, 1947—047-407.

##### CANDIDATE FOR SHERIFF—RESIGNATION AS COUNTY COMMISSIONER

**QUESTION:** Is a person holding the office of county commissioner, elected thereto for a four-year term in 1946, required to resign such office in order to enter the 1948 primaries as a candidate for nomination for the office of sheriff?

*To Honorable Earl Westmark, County Commissioner, Pensacola, Florida:*

The question is answered in the negative; that is to say, that a person who is now a county commissioner does not have to resign from that office in order to be a candidate for nomination for the office of sheriff in the 1948 primaries.

June 23, 1947—047-205.

##### MERIT SYSTEM—NONRESIDENTS—EMPLOYMENT

**QUESTIONS:** 1. Should the merit system regulations contain the provisions set out in sections 112.02 to 112.04?

2. Should nonresidents be certified in the order in which their names appear upon the register or should they be certified only after all residents have been certified?

3. Where there are no residents on the register but the register does contain nonresidents, what are the duties of the merit system in regard to going out and endeavoring to find residents who might be eligible? In other words, should the regular examinations conducted by the merit system be deemed sufficient compliance with the statute or do we have any further duties to get residents on the register?

4. Where a nonresident has been given a provisional appointment, may the nonresident provisional appointee be given a probationary or permanent appointment at a later date when the register may contain (a) resident eligibles or (b) nonresident eligibles?

5. What are the duties of the merit system, if any, in regard to requiring agencies to comply with sections 112.02 to 112.04?

*To Mr. Angus Laird, Merit System Supervisor, Tallahassee, Florida:*

In the merit system regulations certain terms are used which, for a better understanding of this opinion, require definition.

"Register" means a list of names of eligibles for appointment to the numerous positions filled through the merit system agency.

"Eligible" means a person who has the necessary qualifications, such as training and experience, and in addition, has successfully passed the examination for a certain position.

"Certified" means, submitted to the agency for employment.

A "provisional appointment" of a person is made when he has not passed the examination but has had sufficient training and experience for the job.

"Probationary period" means a fixed period of time that an applicant who has been certified as eligible must work at the job prior to permanent employment.

Section 112.02 of the statutes requires that all persons employed to work for the state or any county shall be bona fide residents of the state for two years next prior to the employment except when, after due diligence, no person can be found in the state possessing the required qualifications necessary to the particular employment.

Section 112.03 makes it unlawful for any officer or board, state or county, to employ any person who has not been a bona fide resident for the two years immediately preceding employment except where, after due diligence, no such resident can be found.

Section 112.04 provides that violation of sections 112.02 and 112.03 is a misdemeanor and subjects the officer violating those sections to removal from office.

The foregoing questions are answered in their numerical order as follows:

(1) It is my opinion that you should set out in your regulations at least a digest of sections 112.02 to 112.04. They probably should be inserted immediately following paragraph 3 of section 6 where attention is called to statutory preferences given to veterans.

(2) Under the statutes, resident eligibles only should be certified, if there are such, before nonresidents may be certified.

(3) Examinations are conducted from time to time for the numerous and varied positions filled through the agency. Prior to the examinations wide publicity is given in order to attract all who might wish to apply for the kinds of work needed by said agencies. Also, the merit system supervisor acts as a recruiting agency of employees for the several state agencies using the service. Question 3 is one which cannot be answered except in a general way. It is my opinion that reasonable and sensible effort should be made to find competent residents, if none are on the register, using whatever inexpensive and prompt methods might be possible under the circumstances. For example, the merit system supervisor and the agency needing the employee could make inquiries at employment agencies or might try newspaper advertising if it seemed likely that it would produce competent resident applicants. The statutes require "diligent effort," and I think that means honest, common-sense effort such as would be used by business in trying to find suitable employees.

(4) A provisional appointment is made when the applicant has had sufficient training and experience but has not taken the examination for the position. The only thing between a provisional appointee and a permanent appointment is the examination. A provisional appointee is entitled to probationary or permanent appointment as soon as he passes the next examination. In my opinion, when a nonresident provisional appointee passes the next examination given for the position held by him, he is entitled to probationary or permanent appointment, even though subsequent to his provisional appointment and prior to his examination the register may contain resident or nonresident eligibles.

(5) With reference to requiring an agency to comply with sections 112.02 to 112.04, stated generally, it would seem that the merit system should certify only names of residents when there are residents available, and, I think, also to notify and warn any agency if it should violate those statutes.

May 19, 1948.—048-177.

STATE TUBERCULOSIS BOARD—MEDICAL STAFF—  
REQUIREMENTS

QUESTION: Is the State Tuberculosis Board of the State of Florida empowered to employ experienced medical personnel from without the State of Florida to service exclusively in state tuberculosis sanatoria as staff members without taking the basic science examination?

*To Honorable J. E. Straughn, Secretary, Board of Commissioners of State Institutions:*

In the letter of explanation addressed to the secretary, Board of Commissioners of State Institutions, under date of May 12, 1947, from Dr. R. D. Thompson, superintendent and medical director, it appears that the State Tuberculosis Board desires to exercise the authority granted under chapter 23675, Laws of Florida, 1947, empowering the superintendent of Florida State Hospital and any other institutions under the direction of the Board of Commissioners of State Institutions, when unable to obtain medical personnel residing in the State of Florida, to employ competent medical personnel from without the State of Florida with the approval of the Board of Commissioners of State Institutions.

The Board of Commissioners of State Institutions was created by article IV, section 17, of the constitution of 1885, in part providing, "which board shall have supervision of all matters connected with such institutions in such manner as shall be prescribed by law."

The State Tuberculosis Board was created by section 392.01, Florida Statutes, 1941, providing that the State Tuberculosis Board shall be a body corporate, shall have a corporate seal and be appointed by the governor of the State of Florida.

I find no provision under the laws of the State of Florida placing the three state sanatoria under the control of the Board of Commissioners of State Institutions.

Attention is called to the fact that chapter 23675, Laws of Florida, 1947, is confined to "the superintendent of the Florida state hospital and any other institutions under the direction of the board of commissioners of state institutions. . . ."

Attention is also called to section 456.03, Florida Statutes, 1941, providing in part:

"No person shall be eligible for examination or permitted to take an examination for a license to practice the healing art or any branch thereof or be granted any such license unless and until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this chapter."

There being no provision under the laws of the State of Florida exempting the State Tuberculosis Board from the provisions of sections 112.02 and 112.03, Florida Statutes, 1941, relating to employment of residents of the State of Florida nor from the requirements of examination under the basic science law, the question must of necessity be answered in the negative.

April 2, 1948.—048-112.

PENSION RECOMPUTATION

QUESTIONS: 1. Where a former business manager of Florida State University retired under section 112.05, Florida Statutes, 1941, a little less than three years ago, may the Board of Control now consider the former



employee's application for recomputation of his final ten-year average salary on which the amount of his retirement allowance should be fixed?

2. If the foregoing question is answered in the affirmative, is it lawful to include in the final ten-year average salary paid to such former employee sums paid to him from F.S.U. auxiliary funds and from Westcott estate funds, which payments were by checks on those funds then deposited in banks and not by state warrants?

3. If entitled to recomputation which increases the former employee's retirement allowance, is such increase now payable from the time he retired in 1945 or from a later date?

*To Board of Control, Florida State University:*

While it has been held in some jurisdictions that the fixing of pension awards is usually conclusive and final and that there is no obligation to review an error made in such computation, I have, heretofore, in two instances approved a more liberal and, I believe, a more equitable rule permitting the recomputation where there appeared to be an honest and excusable error in the original computation. It is my opinion that the said board may lawfully recompute an allowance where the board is satisfied an excusable error has been made.

The auxiliary fund and the Westcott estate funds are moneys of the state, and salary paid from those funds to the former employee for services rendered to the state, may be included in computing total salary paid to the former employee even though such funds may not have been deposited in the state treasury.

It is the general rule that one claiming a pension has the duty of initiating his claim by making application therefor to the proper office or agency charged with the administration of the pension fund. This former employee filed his application for retirement in March, 1945. He was the business manager of the Florida State University and well aware of the compensation which had been paid to him by the state, both by state warrant and by checks on the auxiliary funds and the Westcott estate fund. On his retirement in 1945 his allowance was computed only on the funds paid to him by state warrant. He made no claim at that time that his other compensation from auxiliary and Westcott estate funds be included. The former employee in making no claim for the inclusion of these other funds was most likely acting under a mistake of law. If it was a mistake of law, it was his own, regardless of whether or not he may have obtained advice on the question. He has drawn retirement allowance based on the original computation for almost three years on his own requisition made every month, and has accepted them as his due allowance.

It is my opinion that Mr. Kellum is entitled to have included in his final ten-year average salary his total state compensation, including that part paid from the auxiliary funds and the Westcott estate funds, but for the reasons just stated, the increase is payable only from the time of his application for recomputation which appears to have been filed with said board some time in the month of February, 1948.

April 19, 1948.—048-145.

PENSION RECOMPUTATION

QUESTION: After issuance of my opinion of April 2, No. 048-112, wherein I held that the increase in retirement allowance for J. G. Kellum, former employee of Florida State University, was payable only from the date of application for recomputation and not retroactive to the date of his retirement, a further question has been submitted: Would the former employee be entitled to retroactive increase in allowance if on his original application he acted upon erroneous advice and information given him at that time by the then secretary of the Board of Control?

*To Board of Control, Florida State University:*

Accompanying the request for reconsideration are statements by the former employee, as well as by the former secretary of the Board of Control, wherein it is set out that when the former employee became entitled to retire under section 112.05, Florida Statutes, 1941, the secretary told him that the comptroller would not approve the inclusion of state compensation which was not paid by state warrant. The former secretary also stated that in connection with the retirement of another state employee in 1941, someone in the attorney general's office "verbally" requested the secretary not to include in the final ten-year average salary, payments of salary which were not made by state warrant, and that the applicant protested, but concluded he had no recourse other than to accept the computation as made by the secretary of the Board of Control.

Even if such erroneous information and advice were given to the applicant by the secretary of said board, the answer to the question would be the same. The former state employee was given the right to retirement by the statute. There was no need whatever for him to depend on the secretary of the board to prepare or make his claim for allowance. Nor was there any need whatever for him to rely on anything which might have been told him by the board's secretary, the comptroller, or anyone else in regard to his rights under the statutes. It was his duty to prepare, present and prosecute his claim for retirement allowance. If he relied on erroneous advice from anyone, including the secretary of the board, he cannot now complain.

The question requires a negative answer.

August 13, 1947.—047-252.

**SPECIAL RETIREMENT—CONTRIBUTION DEDUCTION**

**QUESTION:** Should I continue to deduct from Dr. John J. Tigert's salary a 5% contribution to the State Officers and Employees' Retirement System, in view of chapter 23975, Laws of 1947?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 23975, Laws of 1947, provides a retirement allowance for Dr. Tigert in the amount of \$4,500 annually, beginning September 1, 1948. Dr. Tigert continues as president emeritus at his full salary until September 1, 1948, at which time the annual retirement allowance of \$4,500 provided by the act goes into effect. The act became a law on June 16, 1947. Section 3 of the act reads as follows:

"The retirement allowance herein provided shall be in lieu of all claims or benefits which may have accrued or which may accrue to said Dr. John J. Tigert under any other retirement law of the State."

On the enactment of chapter 23975, Dr. Tigert became ineligible for the benefits of any other retirement act, and his salary was not subject to any further deductions for contributions to any retirement system. The special retirement act for Dr. Tigert is similar to that provided for state officers by section 112.05 of the statutes, and no contributions are required.

June 9, 1947.—047-169.

**SCHOOL TRUSTEE—YEARS OF SERVICE—ELIGIBILITY**

**QUESTION:** Is an employee of a county, who during the year 1915 served as a school district trustee for a school district established within the county, entitled to include the period of such service in determining the aggregate number of years of service of an officer or employee of the county under the provisions of chapter 22938, Laws of Florida, 1945? (County Officers and Employees' Retirement Act.)

*To Honorable C. M. Gay, State Comptroller:*

Section 2 (5) of the County Officers and Employees' Retirement act provides:

"... Aggregate number of years of service shall mean the total number of years and fractional parts of years of service of any officer or employee, omitting intervening years and fractional parts of years when such officer or employee may not be employed by the county ..."

School district trustees are neither officers nor employees of the county wherein the school district is organized. This question has been definitely settled and determined by the Supreme Court of Florida in *State ex rel Landis v. Lake*, 148 So. 566; *State ex rel Smith v. Hamilton*, 166 So. 742; *State v. Holbrook*, 176 So. 99-102.

Under the authority of these decisions, the foregoing question is answered in the negative.

February 21, 1947.—047-45.

#### ATTORNEY—ELIGIBILITY FOR RETIREMENT

**QUESTION:** Is an attorney retained by the comptroller upon the basis of a monthly retaining fee for the special purpose of effecting the collection of estate taxes, under an arrangement for compensation contingent upon the amount of taxes collected, who is, aside from the services rendered to the comptroller, engaged in the private practice of law, eligible to participate in the State Officers and Employees' Retirement System created by chapter 22831, Laws of Florida, 1945?

*To Honorable C. M. Gay, State Comptroller:*

The State Officers and Employees' Retirement System created by chapter 22831, Laws of 1945, designates the persons who are entitled to enjoy the benefits of the act as "State Officers and Employees shall include all full time officers or employees ... who receive compensation for services rendered from state funds ..."

Under the provisions of chapter 198, Florida Statutes, 1941, imposing a tax upon the estates of resident decedents of the State of Florida, the state comptroller is designated as commissioner to administer the provisions of the statute.

Section 198.07 of the quoted chapter provides:

"The commissioner may appoint and remove such deputy commissioners, examiners, appraisers, attorneys and employees as he may deem necessary, such persons to have such duties and powers as the commissioner may from time to time prescribe. The salaries of all deputy commissioners, examiners, appraisers, attorneys and employees employed by the commissioner shall be such as he may prescribe, and the commissioner and such deputy commissioners, examiners, appraisers, attorneys and employees shall be allowed such reasonable and necessary traveling and other expenses as may be incurred in performance of their duties."

Section 198.10 of the chapter provides:

"Said commissioner may employ special counsel to advise him and to conduct any litigation or proceeding that may be brought by or against him, and such special counsel shall be paid such compensation as said commissioner shall deem proper."

From the material submitted with the request for opinion and explanations of the circumstances under which the subject attorney was employed, it would appear that his employment was arranged under the authority given to the comptroller by the provisions of section 198.10 authorizing

the employment of special counsel. This conclusion is indicated by the fact that during the period from August, 1935, to October, 1943, the fixed amount of money paid to the attorney was in the nature of a retainer. The legal definition of the word "retainer" as announced by numerous adjudicated cases negatives that the amount paid is compensation for services rendered. A retainer is generally considered not to pay for the services which are to be rendered by the attorney for the client. The act consists in paying to the attorney a preliminary fee to secure his services, or rather, as it has been said, to prevent the opposite party from engaging him.

This conclusion is further strengthened by the fact that at the time the initial relationship between the attorney and the comptroller was created, the attorney submitted a brief upon the interpretation of the word "retainer" and by that brief established his relationship not as that of an employee but as that of one retained.

Further in support of this conclusion of the relationship existing between the comptroller and the attorney, it appears from the minutes of the meeting of the Budget Commission at which the employment of the attorney was approved, that it was not contemplated at the time of his retainer that he should receive any compensation for services unless he was successful in collecting estate taxes.

From the information submitted with the request for opinion, I conclude that the applicant for retirement benefits under the State Officers and Employees' Retirement System was not on the effective date of the statute creating the retirement system a full time officer or employee of the State of Florida, and accordingly is not entitled to participate in the benefits of the act.

Your question is, therefore, answered in the negative.

January 9, 1947.—047-27.

#### STATE EMPLOYMENT—DEFINITION

**QUESTION:** Is a person who was continuously in the employ of the State Road Department from April 8, 1936, until January 31, 1937, and who from the first day of February, 1937, to the 27th day of March, 1939, was at the direction of the State Road Department continuously employed in the construction of toll bridges and toll highways upon state road 4-A, known as Overseas highway, during which period his compensation was paid from funds in the hands of the state treasurer created by a loan from the Reconstruction Finance Corporation, an agency of the government of the United States, to Overseas road and toll bridge district for the purpose of constructing toll bridges and toll highways of state road 4-A, and who from the 28th day of March, 1939, to the 8th day of April, 1946, was continuously employed by the State Road Department, entitled upon attaining the age of sixty years while in the employ of the State Road Department to retire and to receive the benefits afforded by chapter 22831, Acts of 1945?

*To Honorable F. Elgin Bayless, Chairman, State Road Department:*

Chapter 22831, acts of 1945, creating the State Officers and Employees' Retirement System, provides that the benefits of the act shall be available to all state officers and employees, which term shall include:

"All full time officers or employees . . . who receive compensation for services rendered from state funds or from funds of the state board of administration or from funds of closed bank receivership accounts or from funds of any state institution . . ."

The statute in question further defines aggregate number of years of service as:

"The total number of years and fractional parts of years of service of any officer or employee, omitting intervening years and



fractional parts of years when such officer or employee may not be employed by the state."

The statute further provides that the benefits of the act are available to any officer or employee who has attained the age of sixty years or more and who at such time is an officer or employee of the state and who has been in the service of the state at least ten years in the aggregate.

Applying the statutory classification of persons entitled to the benefits of the retirement act to the case presented herein, I am of the opinion that the subject employee, during the period of time within which he was engaged in construction of toll bridges and toll highways of the Overseas highway, i.e., from February 1, 1937, to March 27, 1939, was not an employee of the state, within the class designated by the statute, and accordingly that period of time may not be included in determining the total number of years of service. It is, therefore, apparent that on April 8, 1946, when the employee left the service of the state, he had not been employed in the service of the state for at least ten years in the aggregate; accordingly, he is not entitled to the privilege of retirement afforded by the statute.

February 21, 1947.—047-47.

#### CONVICT GUARD—PERIOD OF SUSPENSION

**QUESTION:** In the case of a person employed as a convict guard at the Florida State Prison, who during the period of his employment was suspended from duty without pay for a period of sixty days as a disciplinary measure imposed because of dereliction of duty, at the termination of which period of suspension he resumed his duties—does such suspension constitute a break in the continuity of the employee's service in the computation of his number of years of service under the provisions of the State Officers and Employees' Retirement Act of 1945?

*To Honorable C. M. Gay, State Comptroller:*

The suspension of an employee from duty without pay for a fixed number of days imposed as a disciplinary measure for dereliction of duty does not terminate his employment so as to break the continuity of his years of service under the provisions of chapter 22831, Laws of 1945. The question is accordingly answered in the negative.

#### COMMISSIONS

February 26, 1947.—047-54.

#### COUNTY SURVEYOR—BOND PAYMENT

**QUESTION:** Does section 113.07, Florida Statutes, 1941, apply to a county surveyor so that the premium on his bond shall be paid out of the general revenue of the county? The said surveyor is not drawing a salary from the county commissioners.

*To Honorable James W. West, Attorney at Law, Bushnell, Florida:*

A county surveyor is a county official (article VIII, section 6 of the Constitution of Florida), and section 98.05, Florida Statutes, 1941, provides for his election. His duties, fees, etc., are provided for by chapter 143, Florida Statutes, 1941. He is required under the law to give bond (section 137.03, Florida Statutes, 1941).

Section 113.07, Florida Statutes, 1941, provides in effect that when a county public official is required to post bond the premium on same shall be paid out of the general revenue of the county.

In light of the foregoing law, it is my opinion, that a county surveyor is a public official. He is required to post bond and the premium thereof shall be paid out of the general revenue of the county.

June 29, 1947.—047-228.

#### ENSUING TERM—DURATION—COMMISSION

**QUESTION:** The governor has determined that a vacancy in office exists with respect to one of the commissioners of special fire control district in Hillsborough county, Florida, created and functioning in pursuance of chapter 22734, Laws of Florida, acts of 1945, as amended by chapter 24589, Laws of Florida, acts of 1947, and has appointed a person to fill such vacancy "for the ensuing term." Under such appointment, should the commission issued to such appointee be for a four-year term or for the unexpired portion of the term of his predecessor in said office?

*To Honorable R. A. Gray, Secretary of State:*

The officer of commissioner of said district is a statutory one. Section 2 of said chapter 22734 provides that the business and affairs of such district shall be conducted and administered by a board of five commissioners. Section 3 of said chapter 22734 requires that upon creation of the district the governor should appoint the members of the commission, for terms as follows: one for one year, two for two years and two for three years; and that "upon expiration of the term of any commissioner or any person appointed to fill the unexpired term of any such commissioner for any cause, the governor of the State of Florida, shall appoint a commissioner for said district to hold office for the term of four years from the date of such appointment."

A consideration of chapter 22734 and particularly the aforementioned sections thereof, leads to the reasonable conclusion that in the event of a vacancy in office of one of such commissioners, his successors shall be appointed for the period of the former's unexpired term. On this point, see also article IV, section 7, Florida Constitution, which would fix this same rule in the absence of statutory provision. It appears that article XVIII, section 6, Florida Constitution, applies only to offices under the constitution.

In view of the foregoing, in my opinion the question is properly answered as follows:

The commission to be issued this appointee in pursuance of his appointment by the governor "for the ensuing term," should be for the unexpired portion of the term of office of the appointee's predecessor in office.

May 5, 1947.—047-121.

#### ISSUANCE—REQUIREMENTS—TAX

**QUESTION:** Where an office is to be filled by appointment by the governor and confirmation by the Senate, and an appointment to such office is made at a time when the Senate is not in session and commission of appointee reads, "until the end of the next Senate," subsequently thereto, when the Senate confirms an appointment by the governor to such office, is the appointee so confirmed required to execute oath, bond, if any, and to pay a commission tax in connection with issuance of the commission in pursuance of such appointment and confirmation (as distinguished from execution of such qualifying papers and payment of said tax in connection with an appointee's ad interim commission)?

*To Honorable R. A. Gray, Secretary of State:*

With respect to an office to be filled by appointment by the governor and confirmation by the Senate, if a vacancy exists when the Senate is not in session, it may be filled by executive appointment until the end of the term, if that occurs before the Senate convenes, or if the term does not expire before the next session of the Senate, until the end of the next ensuing regular or special session of the Senate, unless an appointment be sooner made and confirmed and consented to by the Senate. (See section 114.04, Florida Statutes, 1941; In re Advisory Opinion to the Governor

(Fla.); 34 So. 571; In re Advisory Opinion to the Governor (Fla.), 59 So. 782; State ex rel. Landis, Attorney General vs. Bird, et al. (Fla.), 163 So. 248; Advisory Opinion to Governor (Fla.), 2 So. 2d. 378; and Advisory Opinion to Governor (Fla.), 12 So. 2d. 876.)

In my opinion, the question is properly answered as follows:

Upon the Senate's confirmation of such appointment to office by the governor, the issuance of a commission in pursuance of such appointment and confirmation (as distinguished from an ad interim appointment and commission "until the end of the next Senate") would seem necessary; and in connection with the issuance of such commission, the appointee therein named is required to file oath, bond, if any, and pay the fee for such commission required by section 113.01, Florida Statutes, 1941.

November 15, 1948.—048-338.

#### POSTING OF BONDS—PREMIUM—INSURANCE AGAINST BURGLARY

**QUESTION:** The bond of a tax collector is set at \$30,000.00 with an annual premium of \$300.00; however, the surety company to which this official has made application has stated that the bond can be written only in conjunction with an insurance policy protecting the public funds in his custody against burglary, and allied hazards, up to a maximum of \$5,000.00 at an annual premium of \$145.00. Properly, may the county commissioners pay this extra premium of \$145.00 out of county funds?

*To Honorable W. P. Woods, State and County Tax Collector, Perry, Florida:*

Section 113.07, Florida Statutes, 1941, says, in effect that in cases where public officials are required to post fidelity or performance bonds the premium for same shall be paid out of the general revenue fund of the county. I find no law authorizing the premium on an insurance policy protecting the public funds against burglary, to be paid out of county funds. I am told that a bill was introduced in the last Legislature which would have authorized such payment but the same did not become a law.

I might also state that I am not advised that every surety or insurance company qualified in Florida to write fidelity bonds of tax collectors always require, in conjunction therewith, such burglary insurance.

I, therefore, answer the question in the negative.

#### LEAVE OF ABSENCE

April 10, 1947.—047-100.

#### MILITARY LEAVE—TRAINING OR SERVICE

**QUESTION:** What employees of the State of Florida are entitled to leaves of absence with pay for service with the military or naval forces of the United States, whether for training or to enter active service, and for what period of time?

*To Honorable F. Elgin Bayless, Chairman, State Road Department:*

The foregoing question is governed by the provisions of section 115.07, Florida Statutes, 1941, which provide that all officers or employees of the State of Florida who are commissioned reserve officers in the United States military or naval reserve shall be entitled to leave of absence without loss of pay on all days during which they shall be engaged in field or coast defense exercises or other training ordered under the provisions of the United States military or naval training regulations for reserve officers when assigned to active duty pursuant to their commissions, provided that

leave of absence granted as a matter of legal right under the provisions of this section shall not exceed seventeen days in any one annual period. No other state officers or employees are entitled to leave of absence with pay as a matter of legal right.

May 1, 1947.—047-114.

#### UNIVERSITY PROFESSOR—SERVICE WITH ARMED FORCES

**QUESTION:** Is a professor in the University of Florida who was granted a leave of absence for service in the armed forces of the United States in March, 1941, which was prior to the enactment of sections 115.14 and 115.09, entitled to the thirty days' compensation authorized by those sections?

*To Dr. John J. Tigert, President, University of Florida, Gainesville, Florida:*

In an opinion of July 8, 1941, No. 041-361, I held that the statute was retroactive, and, accordingly, your question is answered in the affirmative.

June 2, 1947.—047-152.

#### RESERVE TRAINING—VACATION PERIOD

**QUESTIONS:** 1. How long must a person be employed by the state in order to be regarded as a state employee and entitled to a leave of absence under the provisions of section 115.07, Florida Statutes of 1941?

2. Is such leave of absence with pay in addition to the annual two weeks' vacation with pay?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 115.07 grants a leave of absence of not more than seventeen days in any annual period to state and certain other public officers and employees who hold commissions as reserve officers in the United States military or naval services without loss of pay, time or efficiency rating, when assigned to active duty for training.

A person becomes an employee when in good faith he is given a position and has begun his work, and he is entitled to the leave of absence no matter how short the time he has actually been at work. In other words, if he had in good faith begun his work and had become entitled to any pay whatsoever, he comes within the provisions of the act.

This leave of absence is for a patriotic service to the country. It in no manner affects his right to the annual two weeks' vacation with pay customarily allowed public employees.

July 29, 1948.—048-247.

#### COMPENSATION OF TEACHER—RESERVE OFFICER, TRAINING PERIOD

**QUESTION:** Is a teacher in the public schools who holds a commission as a reserve officer in the armed services entitled to leave of absence with pay when called to active duty for a period of training during the ten months' period of service required of teachers?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 115.07, Florida Statutes of 1941, provides that all officers or employees of the state, or of the several counties or municipalities of the



state, who are commissioned reserve officers, shall be entitled to leave of absence not to exceed seventeen days in any one annual period, without loss of pay, while they are assigned to active duty pursuant to their commissions, etc.

The statute is applicable to a school teacher who is a reserve officer, and your question, therefore, requires an affirmative answer.

I might add that there is a similar provision in section 250.28 applicable to enlisted men who are members of the National Guard and who are called into training.

## POWERS AND DUTIES OF STATE OFFICES AND AGENCIES

December 8, 1947.—047-409.

### CHILDREN'S COMMISSION—PURCHASE OF AUTOMOBILE

QUESTION: May the Florida Children's Commission lawfully purchase a "low priced" car to be used by its executive secretary in her official work as such, the purchase price to be paid from funds provided for the traveling expenses of the executive secretary?

*To Mrs. Sylvia Carothers, Executive Secretary, Florida Children's Commission, Tallahassee, Florida:*

Chapter 23810, Laws of 1947, creating the commission, made an appropriation to carry out the purposes of the act. Sub-paragraph (b) of section 4 of that chapter provides for the salary of the executive secretary and also that

"... the executive secretary shall be paid and reimbursed for reasonable and necessary traveling expenses in carrying on this work, not to exceed the sum of twenty-four hundred (\$2400.00) Dollars per annum."

Sections 116.12 and 116.20, statutes of 1941, prohibit any state officer or employee, agency, department, or institution from purchasing or contracting to purchase any motor vehicle for the use of himself or another, to be paid for out of funds of the State of Florida or any department thereof unless specific appropriation were made by the Legislature for the purchase of such motor vehicle.

Under sections 116.16 to 116.19, certain state agencies are excepted from the provisions of sections 116.12 and 116.20. The agency in question is not one of those excepted, and I do not find in the appropriation for such agency specific authority for the purchase of an automobile. Accordingly, it is my opinion that the agency may not lawfully purchase the automobile.

It is to be remembered that the policy of the Legislature in general has been not to provide automobiles for the numerous state officers and employees who may have need of automobiles in performing their state duties, but rather to reimburse such officers and employees by mileage allowance for the use of their own motor vehicles in such work.

January 9, 1947.—047-1.

### NEPOTISM—EMPLOYMENT OF RELATIVE

QUESTION: Are county judges now permitted to employ one person in their office, and one person only, related within the fourth degree, either by consanguinity or by affinity?

*To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:*

I answer the question in the affirmative. (Section 116.10, Florida Statutes, 1941.)

January 20, 1947.—047-28.

#### UNRECORDED PLAT—ASSESSMENT BY LOTS

QUESTION: Is it proper to assess property by lot numbers when there has not been filed and recorded in this office a map showing that there are in fact any such lot numbers?

*To Honorable A. E. Morgan, Tax Assessor, Taylor County, Perry, Florida:*

In my opinion, the question should be answered in the negative.

I do not find any authority directly on this point but the language used by our court in the case of Crawford v. Rehwinkel, 163 So. 851, leads me to think that if this question were presented to our supreme court, it would hold such a description insufficient.

I suggest that demand be made that the plat of the subdivision be placed on record with the tax assessor, or upon refusal of the owner to record it, that the property be assessed by metes and bounds so there will be no question about the identity of the property's being assessed.

December 3, 1948.—048-351.

#### STATE PLANT BOARD—PURCHASE OF MOTOR VEHICLES

QUESTION: May the State Plant Board, with the approval of the State Budget Commission, purchase jeeps from the Plant Board's incidental fund, such jeeps to be used by its inspectors in the performance of their duties?

*To State Plant Board, Tallahassee, Florida:*

The varied activities of the State Plant Board require its inspectors to drive through flatwoods, hammocks, glades, and other difficult terrain. Heretofore, the board has not supplied motor vehicles for its inspectors; the inspectors have used their own cars. It is indicated that the cars used by the inspectors, due to hard and continuous service, are becoming unfit for duty and are, in fact, not suitable for much of the work required of the inspectors. It is stated that immediate replacement is necessary and that the field men will be unable to supply the replacements. The request for opinion also states that an ordinary automobile is not suitable and that a jeep is about the only type of motor vehicle adaptable to the hard service required. For these reasons, the board proposes to purchase the necessary jeeps for its inspectors.

I have heretofore held on several occasions that automotive equipment necessary for the performance of the functions of a state agency, as distinguished from the mere convenience of transportation of personnel over the highways of the state, may be purchased without violating the statutes requiring specific appropriation for the purchase of motor vehicles—sections 116.12 and 116.20, Florida Statutes, 1941.

If the jeeps are necessary for the efficient and economical performance of the duties of the inspectors, and so determined by the board after careful consideration of all the circumstances, they may be purchased from the board's incidental fund as an item of expense. I find no requirement for approval by the State Budget Commission when so purchased by the State Plant Board.

## NOTARIES PUBLIC

October 30, 1947.—047-366.

COMMISSION ISSUED BY MISTAKE—CANCELLATION OF  
COMMISSION

**QUESTION:** On April 26, 1947, the secretary of state issued a notary commission to Robert Miller, to run four years from date of issue. On October 22, 1947, the secretary of state by mistake issued another commission to the same party to run four years from date of issue. The party was duly appointed by the governor on the respective dates, and he now holds two commissions issued as above. It is necessary that the party be advised of the mistake, and the question arises, which commission shall he be asked to return for cancellation?

*To Honorable R. A. Gray, Secretary of State:*

Inasmuch as the commission which was issued on October 22, 1947, was issued by mistake of your office, I think it is your privilege and you have the authority to cancel the said certificate and advise the party of the action, and request a return of the commission.

August 8, 1947.—047-246.

## USE OF SEAL—DATE OF EXPIRATION—FORM

**QUESTION:** Are the requirements of the statutes of the state complied with in a case where a notary public uses a seal upon which is embossed the date of expiration of commission?

*To Honorable John Kilgore, Motor Vehicle Commissioner:*

Section 117.07, Florida Statutes, 1941, requires that every notary public in the State of Florida shall add to his or her official signature to any acknowledgment taken before him or her relating to or affecting the sale, mortgage, transfer or assignment of any interest in and to real or personal property, a statement of the time of expiration of his or her commission.

There is no requirement other than under the circumstances recited herein that a notary public shall show upon a jurat the date of expiration of notarial commission.

The use of a notarial impress seal upon which is embossed the date of expiration of the notary's commission would not be a compliance with the statutory requirement that the notary should add to his or her official signature the date of expiration of the official commission. Any certificate of a notary public other than that certifying the acknowledgment of an instrument affecting the sale, mortgage, transfer or assignment of any interest to any real or personal property authenticated by a seal upon which is embossed the date of expiration would be a legal certificate, but where such a seal is used to authenticate a certificate of acknowledgment with regard to real estate transfers, it is necessary that the notary add to his signature the words "My commission expires . . . (date . . .)."

April 30, 1948.—048-141.

## WIFE NOTARIZING HUSBAND'S SIGNATURE

**QUESTION:** Is it legal for a wife to notarize her husband's signature?

*To Honorable Millard F. Caldwell, Governor:*

I assume that the wife is a legally appointed and acting notary public.

As a general rule the mere relationship to a party does not disqualify a notary, provided, of course, that the wife has no interest in the transaction to which the instrument so notarized relates. (39 Am. Jur. page 220, note 13; 95 Amr. Dec. 379; 1 C.J.S. Acknowledgments, paragraph 56, page 827; Notes paragraph IV, 33 L.R.A. page 340.)

Even though technically the wife may notarize her husband's signature where she has no interest in the matter, still such practice should be discouraged because of public policy. There are certain formalities that should be observed in the making of such affidavits and there are occasions which might arise where testimony may be adduced in the courts respecting such affidavits and for these reasons and others which I might mention, I think it would be unwise for a wife to notarize her husband's signature.

October 8, 1948.—048-324.

#### CLERK'S COSTS—APPROVAL OF NOTARY BOND

**QUESTION:** May the clerk of the circuit court charge the statutory fee of one dollar (\$1.00) for approving bonds, when such bond is a notary public bond executed by a surety company authorized to transact business in Florida?

*To Honorable C. M. Gay, State Comptroller:*

Section 117.01, Florida Statutes, 1941, as amended in 1943, reads as follows:

"... Every notary public shall, prior to his executing the duties of said officer, give bond to the governor for the time being, in the penalty of five hundred dollars, conditioned for the due discharge of his said office. . . . Said bond shall be approved and filed in like manner and place as the bonds of county officers of the county in which the person so appointed notary public shall reside; provided, however, where such bond is executed by a surety company for hire, duly authorized to transact business in Florida, said bond may be approved by the clerk of the circuit court of said county. . . ."

Since the adoption of the foregoing amendment, bonds executed by personal sureties, or by surety companies, may still be filed and approved, as heretofore, with the Board of County Commissioners and the comptroller. Section 137.01, Florida Statutes, 1941, reads as follows:

"Each of the county officers of whom a bond is or shall be required by law, shall, before he is commissioned, give bond, with not less than two sureties, or a surety company as herein-after specified, to the governor of the State of Florida and his successors in office, . . . which shall be approved by the board of county commissioners and comptroller, and be filed with the secretary of state."

Prior to the amendment of section 117.01, Florida Statutes, 1941, there was no charge for the approval of notary public bonds, whether executed by personal sureties, or duly authorized surety companies, when approved by the Board of County Commissioners and the comptroller.

Section 28.24, Florida Statutes, 1941, provides:

"The compensation of the clerk of the circuit court, as clerk . . . shall be entirely by fees and, unless otherwise provided, shall be as follows: . . . Bonds, approving . . . \$1.00. . ."

It appears that it is the legislative intent that one filing a notary public bond executed by an authorized surety company, may elect whether he wishes to have the said bond approved by the Board of County Commissioners and the comptroller, or the clerk of the circuit court.

When such an election is made, and the said bond is submitted for approval to the clerk of the circuit court, the said clerk may charge the statutory fee for this service.



December 16, 1948.—048-361.

NOTARY PUBLIC—ELIGIBILITY—MARRIED MINOR FEMALE

QUESTION: Is a married female under 21 years of age eligible to be appointed a notary public?

*To Honorable J. E. Straughn, Executive Secretary, Governor's Office:*

On April 15, 1943, in an opinion to Governor Spessard L. Holland (No. 043-100, A. G. R. 1943-44, page 173), I held, in effect, that despite the provisions of section 117.02, Florida Statutes, 1941, authorizing appointment of women over the age of 21 years to the office of notary public, a female 18 years of age whose disabilities of non-age had been removed was eligible for appointment to such office.

Sections 62.23-62.26, Florida Statutes, 1941, providing for the removal of disabilities of minors, male and female, contemplate that entry of an order for that purpose is proper only after the court shall ascertain, among other things, that the applicant is over 18 years of age. Section 62.25 provides that such an order shall authorize a minor "to assume the management and control of all his estate, to contract and be contracted with, to sue and to be sued, and to do and perform any and all acts, matters, and things that he could do if he were twenty-one years of age."

Section 743.03, Florida Statutes, 1941, provides, in effect, that marriage shall remove the disabilities of non-age of all female minors, and that such female minors "may assume the management of their estate, contract and be contracted with, sue and be sued, and do and perform any and all acts, matters and things that she could do if she were twenty-one years of age." It will be noted that the quoted provisions of section 62.25 and 743.03 are identical in effect. It will be recognized that it is quite possible for a female under 18 years of age to marry in this state (e.g., section 741.06, Florida Statutes, 1941).

In view of the foregoing, in my opinion, the question is answered as follows:

As indicated, no minor female under 18 years of age may have her disabilities of non-age removed in judicial proceedings; and I construe this provision as expressive of legislative determination that minors less than that age have not reached such maturity as to warrant removal of said disabilities. Disabilities of non-age of female minors are as effectively removed by marriage as by judicial decree; however, such apparent legislative expression as to eligibility with respect to age in the latter instance reasonably should control here.

Hence, if a female minor is over the age of 18 years and is married, and produces proof of such facts, she is eligible for appointment to the office of notary public.

PUBLIC RECORDS

February 4, 1947.—047-40.

MESSAGE—LISTS OF THOSE REGISTERED

QUESTIONS: 1. Is the Florida Board of Massage required by law to furnish, on request, lists of the registered masseurs and masseuses of this state?

2. Is the representative of the American Association of Masseurs & Masseuses legally entitled to inspect the books and records of the Florida Board of Massage for the purpose of making a list of the registered masseurs and masseuses of this state?

*To Honorable George Warney, Secretary-Treasurer, Florida Board of Massage, Miami, Florida:*

Section 15 of chapter 22034, Laws of Florida, 1943, (known as the Massage Registration Law of 1943), provides as follows:

"The secretary-treasurer of the board shall keep a record book in which shall be entered the names of all persons to whom certificates have been granted under this chapter, the certificate numbers and the dates of granting such certificates and renewals thereof, and other matters of record, and the books so provided and kept shall be deemed and considered a book of records, and a transcript of any record therein, or a certificate that there is not entered therein the name and certificate number of, or date of granting, such certificate to a person charged with a violation of any of the provisions of this chapter, certified under the hand of the secretary-treasurer, and the seal of the board shall be admitted as evidence in any of the courts of this state. The original books, records and papers of the board shall be kept at the office of the secretary-treasurer of said board, which office shall be at such place as may be designated by the board. The secretary-treasurer shall furnish to any person making application therefor, certified by him as secretary-treasurer, upon payment of a fee of twenty-five cents per hundred words so copied, the fee to belong to the secretary-treasurer."

Under the provisions of the quoted section, the law places upon the secretary-treasurer the obligation to furnish a certified copy of the records required by law to be kept by the Florida Board of Massage, upon the request of any person and upon the payment of the fee designated therein. If the registered masseurs and masseuses of this state are listed alphabetically or chronologically or in any other manner so that their names appear on the record in the form of a list, it is clearly the duty of the secretary-treasurer to furnish a certified copy of such list to any person making application therefor, upon the payment of twenty-five cents per hundred words copied. Under these circumstances, the answer to the first question is in the affirmative.

As to the second question: Under the terms of the statute quoted herein, the books and records of the Florida Board of Massage, required by law to be kept, are deemed a matter of public record. This being so, such records should at all reasonable times be open for a personal inspection by any citizen of Florida, in accordance with the provisions of section 119.01, Florida Statutes, 1941. It is the view of our court that section 119.01, providing for the right of inspection, carries with it the right to make copies. (*Fuller v. State ex rel. O'Donnell*, 17 So. 2d 607, 154 Fla. 368.) Therefore, if the personal representative of the American Association of Masseurs & Masseuses is a citizen of Florida, it is my opinion that he is legally entitled to inspect the official records of the Florida Board of Massage and copy therefrom the list of registered masseurs and masseuses.

## STATE OFFICERS AND EMPLOYEES' RETIREMENT SYSTEM

July 29, 1948.—048-256.

### EMPLOYMENT AFTER RETIREMENT—FORFEITURE OF BENEFITS

QUESTION: May a person who has retired under the provisions of the state officers and employees' retirement system accept an office, or employment, with a municipality in the State of Florida without forfeiting all benefits under said law?

*To Honorable C. M. Gay, State Comptroller:*

Section 121.14, Florida Statutes, 1941 (Cum. Supp.), which was section 14 of chapter 22831, Laws of 1945, reads as follows:

"Employment after retirement.—Any person accepting or receiving the benefit of retirement compensation under this chapter shall not be employed in any capacity by the State of Florida or any department, branch or agency thereof and any person accepting or enjoying the benefits of retirement compensation under this chapter who accept employment or receives any other compensation from the State of Florida or any department, branch or agency thereof for services rendered shall forfeit all the benefits of this chapter forever and the state comptroller shall forthwith strike such person's name from the retirement compensation roll and refuse to honor any requisition for retirement compensation made by such person."

There is authority, including decisions of the Supreme Court of Florida, and of the United States Supreme Court to the effect that a municipal corporation is an agency of the state, but it is my opinion that, as used in the quoted statute, the word, "agency," does not include a municipality. Even if it were doubtful, the severity of the penalty, that is, forfeiture of the valuable benefits acquired by a state employee at substantial cost to the employee by way of his contribution to the retirement fund, would require that the doubt be resolved against the forfeiture. Accordingly, it is my opinion the question requires an affirmative answer.

June 12, 1948.—048-202.

#### CITRUS AND VEGETABLE INSPECTORS—EMPLOYMENT BY FLORIDA AND GEORGIA—RETIREMENT

QUESTION: May state employees who are temporarily employed by another state be paid by the State of Florida and the State of Florida be reimbursed by the other state so that these employees may receive credit for this time toward retirement?

*To Honorable C. M. Gay, State Comptroller:*

Certain key employees of the citrus and vegetable inspection division of the Florida Department of Agriculture go to Georgia for approximately two to three months each year to assist the State of Georgia in the inspection of fruits and vegetables. Such employees remain under the same federal-state supervision as when they are in Florida. Heretofore these employees have been paid by the State of Georgia during the time they were working in Georgia.

Even if there were authority to accept from another state, reimbursement of salaries paid by Florida to the employees or the Georgia 3% contribution to the retirement fund, in the manner set up in the question, which is doubtful, the plan would be unlawful because these employees, during their service in Georgia are performing services for the State of Georgia, and not for the State of Florida. There is no authority for any state agency to pay for any services except those which are rendered to the State of Florida; and no service credit may be allowed under the state officers and employees' retirement system except for services to the State of Florida. These men are not employees of the state during their services in Georgia; they are Georgia employees.

Reference is made to section 121.02, (1), (3), and (4), Florida Statutes, 1941. The question requires a negative answer.

June 15, 1948.—048-201.

#### COMPUTING EMPLOYMENT TIME—EMPLOYMENT BEGINNING

QUESTION: In computing the aggregate years of service under the provisions of the "State Officers and Employees' Retirement System" statute, is a person who has been in the employ of the State of Florida as a member of the faculty of the University of Florida at intervals from Octo-

ber 1, 1938, to June 30, 1948, during which period he has accumulated aggregate years of service amounting to nine years and six months, entitled to credit for a period prior to October 1, 1938, during which he was engaged at the University of Florida as a professor upon an exchange basis with the University of North Carolina, for which services he received compensation from the State of North Carolina?

*To Honorable C. M. Gay, State Comptroller:*

The subject professor was not during the period prior to October 1, 1938, an employee of the State of Florida within the meaning of the word "employee" as defined in section 121.02, Florida Statutes, 1941, as amended. Since the total number of years and fractional parts of years during which the professor has been an employee of the State of Florida do not in the aggregate amount to ten years, he will not be eligible to participate in the benefits of the state officers and employees' retirement system in his present status of time served.

The question is accordingly answered in the negative.

April 21, 1948.—048-146.

#### CHOICE OF RETIREMENT SYSTEM

QUESTION: A member of the faculty has taught at the university since 1930 except for a long leave of absence which leave ended January 1, 1948. Is he now eligible to become a member of the state officers and employees' retirement system?

*To Board of Control, Florida State University, Tallahassee, Florida:*

In construing section 121.17, Florida Statutes, 1941, Cum. Supp., I have heretofore held that it was not the intent of the Legislature to give a particular class of county employees two distinct retirement systems from which to make a choice and that those who are eligible for membership in the teachers' retirement system are excluded from the benefits of the county officers and employees' retirement act. The identical language there construed appears in the state officers and employees' retirement act, section 134.17, Florida Statutes, 1941, Cum. Supp., and the same ruling would be applicable. Consistent with that interpretation, I recently held in an opinion to the comptroller, No. 048-96, that the president and vice president of the University of Florida appointed during the current school year automatically became members of the teachers' retirement system on their appointment. I reaffirm what I held in those opinions. The question requires a negative answer.

June 21, 1948.—048-206.

#### RETIREMENT SYSTEMS—PURCHASE OF BONDS— BOARD OF TRUSTEES

QUESTION: What is the legal designation of the holder of registered government bonds purchased with funds of the state officers and employees' retirement system or with funds of the county officers and employees' retirement system?

*To Honorable C. M. Gay, Supervisor, State Officers and Employees' Retirement System, Tallahassee, Florida:*

The holder of registered government bonds purchased with funds of the state officers and employees' retirement system are legally designated as:

"The Governor, the State Comptroller and the State Treasurer of the State of Florida constituting the Board of Trustees of 'State Officers and Employees' Retirement System' authorized by Chapter 22831, Laws of Florida, 1945."



The holders of registered government bonds purchased with funds of the county officers and employees' retirement system are legally designated as:

"The Governor, the State Comptroller and the State Treasurer of the State of Florida constituting the Board of Trustees of 'County Officers and Employees' Retirement System' authorized by Chapter 22938, Laws of Florida, 1945."

September 15, 1948.—048-302.

#### RETIREMENT SYSTEMS—PURCHASE OF BONDS—REGISTRATION

QUESTION: May bonds purchased with funds of the State Officers and Employees' Retirement System be legally registered under the following designation: "Board of Trustees of State Officers and Employees' Retirement System authorized by Chapter 22831, Laws of Florida, 1945?"

*To Honorable C. M. Gay, Supervisor, State Officers and Employees' Retirement System, Tallahassee, Florida:*

On June 21, 1948, official attorney general's opinion 048-206 designated an approved description of the holder for the registering of government bonds purchased with funds of the State Officers and Employees' Retirement System for investment, which designation was in accord with circular No. 530, section 315.5 (b) (2), United States Treasury Regulation.

In the light of the objection interposed by the United States Treasury Department to the employment of the aforesaid approved designation, the question presented is answered affirmatively.

The former official opinion referred to is superseded by this opinion to the extent indicated.

## CHAPTER X

### COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

#### COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

February 28, 1947.—047-67.

##### RIGHT TO GRANT WATER FRANCHISE

**QUESTION:** Is there any provision in the laws of the state which would enable the county commissioners of Sarasota county to grant a franchise to a private individual to maintain a water system serving more than twenty-five homes in a subdivision outside of the city limits and to charge for the water used?

*To Messrs. Evans and Glenn, Attorneys for the Board of County Commissioners of Sarasota County, Sarasota, Florida:*

Under the constitution, article VIII, section 5, the duties and compensation of boards of county commissioners must be prescribed by statute and such boards have only such powers as are conferred thereby (*State ex rel Himes vs. Culbreath*, 128 Fla. 210; 174 So. 422), and "where there is doubt as to the existence of authority it should not be assumed." (*Gesner vs. Del-Air Corporation*, 154 Fla. 829; 17 So. 2d. 522.)

Chapter 125, Florida Statutes, 1941, sets forth the powers and duties of the county commissioners.

I am unable to find any law giving the county commissioners the authority to grant such a franchise as mentioned.

September 8, 1947.—047-287.

##### MAJORITY COMMISSION RULE—POWER TO POOL ROAD FUNDS

**QUESTION:** The Board of County Commissioners of Columbia County, composed of five members, voted on a resolution to pool road funds; three members voted for the resolution and two against it. Under the circumstances outlined below, can the three commissioners who voted for the resolution compel the other two commissioners to surrender their equipment and leave the entire road and bridge fund in a pool to be spent as a majority of the board sees fit, so long as the same is legitimately spent, from the road and bridge fund?

*To Honorable W. J. Ferguson, County Attorney, Columbia County, Lake City, Florida:*

As outlined in the request for opinion, it seems that the Board of County Commissioners of Columbia County has been operating the road and bridge fund by the respective districts for the past several years. That is to say, each commissioner has looked after all of the roads and bridges in his respective district, and directed the maintenance of the same, and has hired and fired all of the labor in his respective district and has also purchased equipment to be used in his respective district, such as a truck, lumber, culverts, working tools, and etc. The clerk of the circuit court divides the road and bridge fund into five equal parts and one part goes to each respective county commissioner's district. The county commissioners, at a recent meeting, passed a resolution (three members voting for the resolution and two members voting against the resolution), to pool all of the money which comes to the road and bridge fund and hire a county road

superintendent to supervise all of the county roads and bridges in the county and to pool all the equipment; all of the said equipment to be available to the road superintendent to be used in the construction and maintenance of all county roads and bridges. The two county commissioners who voted against the resolution have indicated that they will not surrender their equipment to be used in any district other than their respective district, and insist that their part of the road and bridge fund monies be allotted to them, as it has been in the past, for them to spend as they see fit in their respective districts.

I assume that the road and bridge fund mentioned is obtained from ad valorem taxation and is not derived from sources such as are in section 343.18, Florida Statutes, 1941.

I assume that you have no special statute which would govern the division of such fund.

In the absence of any such special statute I assume, further, that hitherto, the division of these funds into five equal parts and under the administration of each county commissioner, has been done solely by action of the board.

The Board of County Commissioners has charge of said road and bridge fund and a majority of the county commissioners has power to act in reference to said fund.

"In the absence of contrary provisions of law duties duly conferred upon 'county commissioners' or upon 'the board of county commissioners' may be performed by a majority of the county commissioners at a lawful meeting." (Scott v. State, 143 So. 249.)

It is my opinion that the action of the majority of the Board of County Commissioners in this instance should govern.

March 26, 1947.—047-88.

#### CHAIRMAN AS PURCHASING AGENT

QUESTION: Can the chairman of the Board of County Commissioners also be the purchasing agent for that county?

*To the Chairman, Board of County Commissioners, LaFayette County, Mayo, Florida:*

I assume that there is no special law providing for the appointment of a purchasing agent to make all county purchases, and I know of no general law providing for such an employee.

In the absence of any law providing for the appointment of such purchasing agent for the county, I answer the question in the negative?

June 12, 1948.—048-199.

#### POWERS OF COMMISSIONERS—DURATION OF EMERGENCY— POSTWAR FUND

QUESTION: In view of the fact that the authority to levy and collect taxes under chapter 23392, Laws of Florida, acts of 1945, is limited to "during the emergency of the present war," may the county commissioners at this time levy a millage and place it in what they call a "Post-War Fund"?

*To Honorable C. M. Gay, State Comptroller:*

County commissioners have no powers other than those expressly vested in them by statute, or that must be necessarily implied therefrom to carry the express powers into effect, and where there is doubt no such powers should be assumed. (Crandon v. Hazlett, 157 Fla. 574, 26 So. 2d. 638.)

The act in question creates in Manatee county "during the emergency of the present war" a special fund to be used for postwar purposes and to be used to provide public works "prior to, during and after the demobilization of our armed forces" mobilized during the late war. It appears from the title of the act that it was intended to "create in Manatee County . . . during the emergency of the present war, a special fund, to be used" for postwar purposes.

An "emergency" has been said to be a condition resulting in social disturbances or distress (20 C. J. 499). The president of the United States, by proclamation No. 2714, proclaimed "the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946." Although a treaty of peace has not been executed between the warring parties, in the light of the foregoing, I am of the opinion that the emergency of World War II has come to an end within the meaning of the foregoing quoted phrase from chapter 23392, Laws of Florida, acts of 1945. The question should be answered in the negative.

August 29, 1947.—047-280.

#### DREDGING BOAT BASIN—COUNTY PURPOSE

QUESTION: Does the Board of County Commissioners of Franklin County have the authority to incur the expenses of dredging a permanent boat basin in Apalachicola, Florida, approved by a U. S. Engineer, for the purpose of giving the boat owners a place to dock their boats out of storms and bad weather?

To Mr. Wm. F. Randolph, Chairman, Board of County Commissioners, Franklin County, Apalachicola, Florida:

I am not unmindful that such a project would be a most worthy one.

I do not find where the Legislature has determined that this specified project is for a county purpose.

"County commissioners have no powers other than those expressly vested in them by statute or that must be necessarily implied to carry into effect powers thus expressly vested." (Crandon v. Hazlett, 26 So. 2d. 638.)

"County commissioners have only such powers as are granted them by statute and the constitution and where there is doubt as to the existence of authority it should not be assumed." (Gessner v. Del-Air Corporation, 17 So. 2d. 522.)

"The powers of boards of county commissioners are wholly statutory and they cannot impose taxes or spend county funds for any purpose other than such as the legislature has determined to be county purposes." (Dissenting opinion, Justice Brown, Brown v. Winton, 197 So. 543.)

The Board of County Commissioners has no authority to determine what constitutes a county purpose, even though they may in reality be in a better position to know what determines a county purpose than the Legislature itself. (Dissenting opinion of Justice Brown, supra.)

In view of the law, I must answer the question in the negative.

July 23, 1948.—048-248.

#### DEPUTY SHERIFF INJURED—HOSPITAL EXPENSES—PAYMENT

QUESTION: A deputy sheriff of St. Johns county, while in the performance of his duties, in attempting to arrest an escaping felon was shot and severely wounded, making it necessary for him to be hospitalized and to procure the services of a physician. May the Board of County Commis-



sioners lawfully expend public funds for the purpose of paying a reasonable charge for such hospitalization and physician?

*To Honorable Frank D. Upchurch, Attorney at Law, St. Augustine, Florida:*

The Supreme Court of Florida has frequently held that county commissioners have only such authority as is conferred by statute and where doubt exists as to any authority it should not be assumed.

I do not find any authority giving the county commissioners the authority to expend county funds for such purposes.

I, therefore, answer the question in the negative.

July 24, 1947.—047-219.

#### TRAVEL EXPENSE—COMPENSATION—COUNTY PURPOSES

**QUESTION:** Does the fact that by chapter 17829, Laws of Florida, acts of 1937, a salary of one hundred dollars per month is provided for the members of the Board of County Commissioners of Marion County make it unlawful or improper for the members of that board to be paid actual expenses incurred by them for the use of their automobile and other actual out-of-pocket expenses in the performance of their duties?

*To Honorable Carlyle Ausley, Clerk of Circuit Court, Marion County, Ocala, Florida:*

Under date of June 23, 1947, I rendered an opinion in which I stated that this law would not permit the Board of County Commissioners to be paid an extra fifty dollars per month. The question posed herein is quite different to the question answered by me on June 23, 1947.

Chapter 17829, Laws of Florida, acts of 1937, is as follows:

"AN ACT Fixing the Compensation of the County Commissioners of Counties of the State of Florida Having a Population Not Less Than Thirty Thousand Seven Hundred and Not More Than Thirty Thousand Eight Hundred According to the 1935 State Census.

"Be It Enacted by the Legislature of the State of Florida:  
"Section 1. That in every County in the State of Florida which now has a population of not less than thirty thousand seven hundred (30,700) and not more than thirty thousand eight hundred (30,800) inhabitants according to the nineteen hundred thirty-five (1935) state census of the State of Florida, each of the County Commissioners shall be paid Twelve Hundred (\$1,200.00) Dollars per annum, payable in twelve (12) equal monthly installments. . . ."

It will be noted that although the body of the act says that the commissioners shall each be paid \$1200 per annum, the title of the act calls attention to the fact that this is compensation of the said county commissioners.

On April 13, 1938, the attorney general rendered an opinion on chapter 16894, Acts of 1935, which act provided "that the annual salary of county commissioners of Volusia County shall be \$1800, payable in monthly installments"; and the question asked was whether or not the county commissioners of that county would be entitled to mileage for the use of their personally owned automobiles or any other traveling expenses. The attorney general in office at that time said:

"Assuming, for the purpose of this opinion, the constitutional validity of Chapter 16894, Laws of Florida, Acts of 1935, and further assuming its applicability to Volusia county, it is my opin-

ion that certain necessary items of traveling expenses may legally be paid to the county commissioners. To begin with, the statute to which you refer is silent on the question of traveling expenses and makes provision only for compensation. Compensation is entirely different from traveling expenses for the latter is intended to be reimbursement for actual expenditures made by an individual commissioner on behalf of the county. (See collection of cases in annotation of 106 ALR 781 to 783.)

I think that the question here is the same as propounded to the attorney general in 1938, and in my opinion, therefore, the county commissioners of Marion county are entitled to their compensation of \$1200 per annum, as provided by chapter 17829, as well as actual expenses incurred by them for the use of their automobiles or any other traveling expense.

In the opinion dated April 13, 1938, the attorney general further stated:

"In order to be considered legal expense accounts must conclusively show that they were incurred strictly for county purposes. They should contain detailed information similar to that required to be stated in expense accounts of state officers and employees. Any doubt arising from failure of the records to disclose the nature of the traveling expense item as being strictly a reimbursement for money advanced should be resolved against the legality of the expenditure . . . ."

and in this, I concur.

June 24, 1947.—047-176.

#### EXTRA PAYMENT—COMPENSATION

**QUESTION:** Chapter 17829, Laws of Florida, acts of 1937, allows the county commissioners of Marion county to draw a salary of one hundred dollars each, per month. The volume of road inspection and investigations, other than regular board meetings, costs them in the neighborhood of fifty dollars per month over and above what they actually receive as compensation. Is there any statute whereby the commissioners can be paid an extra fifty dollars per month?

*To Honorable Carlyle Ausley, Clerk of Board of County Commissioners,  
Marion County, Ocala, Florida:*

Chapter 17829 provides in part as follows:

"That in every county of the State of Florida which now has a population of not less than 30,700 and not more than 30,800 inhabitants according to the 1935 state census of the State of Florida, each of the county commissioners shall be paid \$1200 per annum, payable in twelve equal monthly installments."

As will be noted the compensation to be paid the commissioners by this chapter is not limited to their services for attending board meetings but seems to contemplate their entire compensation. In my opinion, therefore, they would be limited to twelve hundred dollars per year.

I do not pass upon the constitutionality of this act.

February 18, 1948.—048-59.

#### ADVERTISING FOR BIDS—FURNITURE FOR OLD FOLKS' HOME

**QUESTION:** The Board of County Commissioners of Monroe County, Florida, advertised for bids for furniture for the new county old folks' home in accordance with section 125.08, Florida Statutes, 1941, and bids were made returnable to the last regular meeting. No bids were received in response to advertisement for the new county home ready for occupancy, and the board desires to move into the new home by March 1, 1948, as present

facilities are inadequate and most undesirable. Request opinion as to whether or not board will have to readvertise for new bids or whether or not board can now go out and purchase necessary furniture as no bids have been received in compliance with above statutory provision. In event the board has to readvertise, what procedure must be followed if again no response is received to new advertisement for bids?

*To Honorable Paul E. Sawyer, Legal Advisor, Board of County Commissioners, Monroe County, Key West, Florida:*

If the Board of County Commissioners of Monroe County, Florida, complied bona fide with the requirements of section 125.08, Florida Statutes, 1941, in every material respect and have exhausted all reasonable efforts to get bids for furnishing said materials, without obtaining any results therefrom, and have good reason to believe that readvertising for bids would not produce bids; then said board would have a right to purchase said materials in the open market.

The foregoing is a statement of the general rule and is not to be construed as holding whether there has, or has not, been a compliance with said statutory requirements, in this, or in any other particular case.

October 11, 1947.—047-329.

#### EMERGENCY REPAIRS—ADVERTISING FOR BIDS—PUBLIC CONVENIENCE

**QUESTION:** The draw on Volusia county bridge crossing Indian river at New Smyrna Beach was knocked off turntable by a boat, creating a hazard to inland waterway navigation between Jacksonville and Miami. Tidewater Construction Company, building Broadway bridge for the State Road Department at Daytona Beach, is the nearest concern having equipment available to pick the draw up and place it back on turntable. They estimate the cost at approximately three thousand dollars and are willing to rent equipment to the county and furnish men and material on cost plus pairs. Does section 125.08, Florida Statutes, 1941, or other statutes prevent basis. Total damage to bridge may reach ten thousand dollars for all re the Board of County Commissioners of Volusia county, from obtaining necessary services and equipment from Tidewater Construction Company to remove draw from channel without advertising for bids? (To require advertising would leave the channel partially blocked for several weeks.) Is it necessary to call for bids for the remaining repairs to open bridge for vehicular traffic?

*To Honorable Charles W. Luther, Attorney, Board of County Commissioners of Volusia County, Daytona Beach, Florida:*

Section 125.08, Florida Statutes, 1941, reads as follows:

"No contract shall be let by the board of county commissioners for the working of any road or street, the construction or building of any bridge, the erecting or building of any house, nor shall any goods, supplies or material for county purposes or use be purchased, when the amount to be paid therefor by the county shall exceed three hundred dollars, unless notice thereof shall be advertised once a week for at least two weeks in some newspaper of general circulation in the county, calling for bids upon the work to be done or for the goods, supplies or materials to be purchased by the county, and in each case the bid of the lowest responsible bidder shall be accepted, unless the county commissioners shall reject all bids because the same are too high."

It might be that, technically, this section would not cover repairs to bridges, but I render no opinion on this point.

I feel that the Legislature, when it passed said section 125.08, had in mind normal conditions and not a condition created by an emergency such as mentioned herein.

It is the duty of the county commissioners to build and keep in repair county buildings, roads and bridges. (Section 125.01, Florida Statutes, 1941.)

In my opinion, an emergency exists which would warrant the county commissioners, and I feel as if it is their duty, to see that this draw is removed from the channel at once and without the delay which would be caused by advertising, although the repairs would be more than \$300.00. I feel sure that the county commissioners in exercising their duty in this respect will see that the company which does remove the draw will do so at the least possible cost to the county and at the earliest possible moment.

As to the remaining repairs contemplated to open the bridge for vehicular traffic, this would depend upon the emergency of the matter and the necessity of the bridge for such traffic. If this vehicular traffic can be reasonably served by other bridges and the public be not unduly and unreasonably hurt because of the time taken to advertise for bids for this work, then I think the county commissioners should follow section 125.08, as from your telegram the repairs for this part of the bridge will also cost more than \$300.00.

On the other hand, if the bridge is absolutely necessary for the public and it would suffer unduly for lack of this bridge, I think the county commissioners would be justified and that they would have the authority to have same repaired at once without the necessity of advertising.

This opinion is not to be construed in any manner as giving county commissioners in normal times the right or authority to ignore said section 125.08, but only in cases of the most extreme emergency.

January 24, 1948.—048-31.

#### LIABILITY FOR TORT—PROPERTY DAMAGE INSURANCE

QUESTION: Is the payment of a premium by the county for public liability and property damage insurance authorized and proper where the county is not liable in tort?

*To Honorable Harry A. Johnston, County Attorney, Palm Beach County, West Palm Beach, Florida:*

"A county cannot be burdened with debt except so far as the power is given therefor." (National Bank of Jacksonville v. Duval County, 34 So. 894.)

"Indebtedness must be such as county may incur else it will not be liable." (Payne v. Washington County, 6 So. 881.)

"County commissioners can exercise such authority only as is 'prescribed by law' and where there is doubt as to the existence of authority it should not be assumed." (Hopkins v. Special Road and Bridge District, 74 So. 310.)

Inasmuch as the county is not liable in tort, in line with the foregoing decisions, in my opinion, the county has no authority to pay premiums for public liability and property damage insurance; the payment of said premiums not being for a proper county purpose.

I assume that there is no local, special or population act which might affect this question.

I can well appreciate the situation in Palm Beach county, in that, it has a large number of vehicles in service; that accidents are increasing; that some of these accidents are caused by the negligence of drivers of county



vehicles, and in many instances the county commissioners feel a moral obligation to compensate for the damages.

I suggest that the county commissioners consider the matter of getting legislation passed similar to legislation now affecting county boards of public instruction. The Florida school code contains a provision requiring the county board to carry insurance to protect children transported in school buses, whether they are transported in county board vehicles, or under contract. Another provision of that same section specifically permits the school board to carry insurance to protect any one for personal injury or property damage inflicted by school vehicles.

January 13, 1948.—048-11.

#### EQUIPMENT PURCHASES—RADIO FOR SHERIFF—PURPOSE OF RADIO

QUESTION: Can the Board of County Commissioners of Seminole County legally purchase and provide the sheriff's office and automobiles with radio transmitting and receiving equipment for special use of the sheriff and his deputies?

*To Honorable Lloyd F. Boyle, County Attorney, Seminole County, Sanford, Florida:*

I assume that the equipment mentioned is the usual equipment furnished law enforcement officers in their efforts to apprehend criminals.

In 1939, page 57, A. G. O. the attorney general said, in effect, that substantial items of equipment for the sheriff's office itself should be purchased by the county commissioners. In this opinion I concur.

There would be little use, however, in purchasing the said equipment for the office itself unless the sheriff's automobiles were equipped to receive from and send messages to the office.

It is my opinion that if the county commissioners find it necessary in the due enforcement of law to purchase the equipment mentioned, they may do so, but let it be distinctly understood that whatever equipment is bought shall remain the property of the county.

Attention is invited to the fact that transmitting equipment may have to be licensed or qualified with the federal authorities.

September 13, 1947.—047-296.

#### AUTOMOBILE—PURCHASED FOR SHERIFF—AUTHORITY TO PURCHASE

QUESTION: Please advise if there is any authority of law for a Board of County Commissioners to purchase an automobile for the county for the use of the sheriff's office.

*To Honorable C. M. Gay, State Comptroller:*

I gather from the correspondence attached to this request that the automobile is to be used by the sheriff for the patrol of beaches, county highways, etc., to see that the laws are properly enforced.

It appears that, in so patrolling, the sheriff is not paid a mileage fee for such services.

Inasmuch as this is a county purpose and one which, in my opinion, seems to be needed in a great many congested sections of the state, the county commissioners can buy an automobile for the use of the sheriff for this purpose. In the use of this automobile the sheriff is not to be paid any mileage fee.

This opinion is restricted to the purchase of an automobile for the purpose mentioned herein and under the circumstances described.

August 14, 1947.—047-253.

#### CLAY PIT—PURCHASE OUTSIDE COUNTY—ROAD CONSTRUCTION

**QUESTION:** May the county commissioners of one county purchase a clay pit located in another county for use in road construction in their county?

*To Board of County Commissioners, Seminole County, Sanford, Florida:*

The powers of county commissioners in this state include the power to "build and keep in repair county . . . roads and bridges . . . to alter, lay out, maintain, establish, vacate or discontinue any road or highway in their respective counties . . . to perform all other acts and duties which may be authorized by law." (Section 125.01, Florida Statutes, 1941.) They have general superintendence over county roads and may procure necessary material for road construction and repair, including the purchase of timber, sandstone, limestone and other road materials (sections 343.01, 343.06 and 343.07, Florida Statutes, 1941).

County commissioners of this state have only the powers expressly granted them by statute and such other powers as may be necessary to enable them to carry into effect such express powers (*Crandon v. Hazlett*, . . . Fla. . . ., 26 So. 2d. 638, text 642). Where necessary road building materials are not available in their county, county commissioners doubtless have the authority to procure them where available, otherwise it might not be possible to make necessary road construction and improvement. I do not think that the laws of this state require the county commissioners of a county to pay excessive prices for road material, although the same may be available in their county, otherwise road construction might be unreasonable and maybe prohibitive.

I am, therefore, of the opinion that if road construction may be made less expensive by procuring clay from another county that the county commissioners of a county may procure clay in another county. The clay might be purchased in the form of a clay pit if such purchase will reduce road construction expense, and no excessive amount of land is purchased. I think the question should be answered in the affirmative.

June 14, 1947.—047-159.

#### ADDITIONAL EQUIPMENT—AUTHORITY TO LEASE

**QUESTION:** The Board of County Commissioners of DeSoto County, in adopting the budget for the fiscal year 1946-47, provided for an item of ninety-six thousand one hundred seventeen dollars and forty cents for expenditure under the General County Road Fund. The expenditures so far, for the different items making up the budget leave, as of June 10, a balance of sixteen thousand six hundred forty dollars and seventy-six cents in this fund. This will be just about enough to carry on the operations of the road work in the county for the balance of the fiscal year. The county is in need of additional equipment to carry on its road work but is without funds to purchase same. Would it be possible for the board to enter into a lease arrangement, leasing the necessary equipment on a daily, hourly, weekly or monthly basis for the balance of the fiscal year, with the understanding that the needed equipment would be purchased at the beginning of the next fiscal year?

*To Honorable John H. Treadwell, Jr., Attorney for the Board of County Commissioners, DeSoto County, Arcadia, Florida:*

The Board of County Commissioners by section 125.01, Florida Statutes, 1941, is authorized "to build and keep in repair county buildings, roads and bridges."

To build and keep in repair such buildings, roads and bridges, would seem to give the county commissioners the authority to obtain the necessary machinery with which to build and keep in repair such property of the county.

If, therefore, the county commissioners deem it necessary and advantageous to the county to have sufficient machinery to build and keep in repair its buildings, roads and bridges; in my opinion, they could enter into a conditional sales contract for the purchase of machinery or rent such machinery with an option to purchase.

Provided, of course, that the said payments under the conditional sales contract or the said rental must be paid from the 1946-47 budget; and provided further, that if the amount to be paid for the machinery by the county shall exceed three hundred dollars, then the provisions of section 125.08, Florida Statutes, 1941, must be strictly complied with.

August 7, 1947.—047-244.

#### CONTRIBUTION TO LEGAL FUND—PRIVATE INDUSTRY

**QUESTION:** Is it legal for a Board of County Commissioners to contribute to a fund for hiring counsel to attempt to open Lake Okeechobee to commercial fishing?

*To Honorable T. W. Conely, Jr., Attorney for the Board of County Commissioners, Okeechobee, Florida:*

The following facts have been presented in the request for opinion:

"The Lake Okeechobee Commercial Fisheries Association has requested the board of county commissioners of Okeechobee county, Florida, for a contribution for the purpose of employing attorneys to institute court proceedings to open Lake Okeechobee to commercial fishing. The commissioners are informed that approximately ten thousand dollars is necessary in order to meet the obligations for which the association has obligated itself. The request is justified, in the opinion of the association, because the livelihood of many of the citizens of Okeechobee county is affected by the closing of the lake, to say nothing of the loss to the community of the money put in circulation by the fishermen."

I know of no law which would give the county commissioners authority to make the contribution to this cause. I, therefore, answer the question in the negative.

October 22, 1947.—047-351.

#### CONTRIBUTIONS OF COUNTY FUNDS—EXPENSES FOR PRIVATE PERSONS

**QUESTION:** Do the county commissioners of Okeechobee county have the authority to contribute two hundred fifty dollars to be used in meeting a part of the expenses of a committee of sixteen citizens, which committee has been organized for the purpose of working out a better drainage program for the Kissimmee River Valley and Lake Okeechobee regions; said program being of vital interest to the entire portion of South Florida of which Okeechobee county is a part?

*To Honorable T. W. Conely, County Attorney, Okeechobee County, Okeechobee, Florida:*

Let me say I can well appreciate the importance to the community of such a program, but I find no authority in the law for said county commissioners to make such a contribution, however worthy the program might be.

"County Commissioners can exercise such authority only as is 'prescribed by law,' and where there is doubt as to the existence of authority, it should not be assumed." (*Hopkins v. Special Road & Bridge District No. 4, etc.*, 74 So. 310.)

I am sure that you can see the wisdom of this ruling of our supreme court. From time to time many other worthy county projects will arise, some of the promoters of which will think that their programs are of such importance and magnitude that the county commissioners should contribute to same, while others will think that their projects also should receive contributions from the county. Endless confusion and misunderstanding will arise unless the county commissioners hold strictly to their statutory powers.

July 28, 1947.—047-234.

#### VENDING MACHINE—LOCATION IN COURTHOUSE—AUTHORITY

QUESTIONS: 1. Does any county officer or other person have the right to place an automatic vending machine for the sale of soft drinks, etc., in the court house for the use of the public and receive the profits thereof?

2. What position should the county commissioners take in such a matter if this situation should occur?

3. In the event that it is permissible to operate such a machine in the court house, what license should be required?

4. In the event it is not lawful for an individual to operate such a machine, would it be lawful for the county commissioners to allow a charitable institution or a club, such as 4-H clubs, to place a machine in the court house and attend to all the services of such a machine and use the funds derived therefrom for their club activities?

*To Honorable Ben Coker, Clerk of Board of County Commissioners, Hardee County, Wauchula, Florida:*

It is not possible to place a separate meter for such a box and it would be operated on current which is paid for by the county from general revenue.

I know of no law in the state which would permit the county commissioners to install or allow anyone else to install vending machines in the court house for the use of the public and receive the profits therefor, save and except by chapter 22681, Laws of 1945, the county commissioners may under certain conditions allow the installation of vending machines therein by needy blind persons; therefore, the first question must be answered in the negative.

Answering the second question, the county commissioners should refuse to allow the installation of any vending machine unless same is permitted by chapter 22681, Laws of 1945.

Answering the third question, the county commissioners should not accept any license at all for the operation of any such machine, unless and except the said machine comes under the provisions of chapter 22681, Laws of 1945.

Answering the fourth question, the county commissioners have no authority to allow any club or charitable institution to install any such vending machine in the court house save and except by the needy blind as set forth in chapter 22681, Laws of 1945, and only then in strict accordance with that said law.

I feel sure the wisdom of this law can be appreciated for the court house is built as a place where the business of the county can be conducted. If one club or charitable institution should be allowed to install a vending machine in the court house there should be no discrimination if other organizations should ask for that same privilege. It can readily be seen how this condition could hamper the business of the county.



May 21, 1948.—048-171.

SEBASTIAN INLET DISTRICT—CERTIFICATES OF INDEBTEDNESS  
—ANTICIPATED REVENUE

QUESTION: Is the Sebastian inlet district authorized to borrow money payable over a period of two years, pledging anticipated revenues of the district, such money to be used to open Sebastian inlet; said district having an annual maintenance tax of three mills?

*To Honorable A. Fortenberry, Chairman, Board of County Commissioners, Cocoa, Florida:*

I am not unmindful of the necessity of opening the inlet and the effect which said opening might have upon the property of owners adjacent thereto.

Section 16 of chapter 12259, General Laws of 1927, reads as follows:

"That said board is hereby authorized and empowered in order to provide for the work prescribed by this Act and to pay the expenses incident to all such work or any other expense necessary in carrying out the general purposes of this Act, to borrow money, temporarily, from time to time for periods of time not exceeding two years at any one time, and to issue its promissory notes therefor upon such terms and at such rates of interest, not exceeding seven per cent per annum as said board may deem advisable. Any note so made and issued may be paid out of the proceeds of the bonds authorized to be issued by this act or out of any other revenues or funds of said board, and said notes shall be a charge upon all of the revenue and property of said board. In case of an injury by storm or otherwise to any of the works of this district, thereby causing an emergency which must be met at once in order to protect or reconstruct such works, said board is authorized to borrow money under the terms prescribed above in order to meet such emergency."

This section became a law on May 11, 1927.

After the enactment of said chapter 12259 the people of the State of Florida adopted as a part of their constitution section 6 of article IX, which reads as follows:

"The legislature shall have power to provide for issuing state bonds only for the purpose of repelling invasion or suppressing insurrection, and the counties, district or municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such counties, districts or municipalities shall participate, to be held in the manner to be prescribed by law; but the provisions of this act shall not apply to the refunding of bonds issued exclusively for the purpose of refunding of the bonds or the interest thereon of such counties, districts, or municipalities." (As amended, general election, Nov. 4, 1930.)

A question similar to the one under consideration here was submitted to our supreme court by the county of Leon and our supreme court there held that certain tax anticipation certificates of indebtedness sought to be issued by Leon county to finance the erection of a jail and for which anticipated taxes were pledged were in reality bonds and forbidden by the said amendment to the constitution. (Leon County vs. State, 165 So. 666.)

In the light of this case, it is my opinion, that the Sebastian inlet district cannot borrow the money for the time mentioned by you and pledge the anticipated tax revenues of the district in payment of the same.

I, therefore, answer the question in the negative.

Attention is invited to the case of *Tapers v. Pichard*, 169 So. 39, wherein the supreme court approved a financing of the said Leon county jail and although the said Sebastian inlet may not issue the notes, as outlined supra, yet it might determine whether or not to finance the contemplated work in the manner as shown in the said *Tapers-Pichard* case.

August 26, 1947.—047-293.

#### COUNTY JAIL—RESPONSIBILITY FOR JAIL MAINTENANCE

QUESTIONS: 1. Does the sheriff, or the Board of County Commissioners, have the power, duty and responsibility to select, provide and pay for the following items in connection with the operation of a county jail?

(a) Equipment including permanent and detachable fixtures; (b) supplies, other than those used for feeding prisoners; and (c) utensils, fixtures, and utilities.

2. In connection with the foregoing, is the county jail to be considered a county institution to be maintained, equipped, and supplied by the county commissioners from general county funds, or is it a part of the office of the sheriff to be equipped by the county as provided in section 145.05, Florida Statutes, 1941, and supplied at the expense of the sheriff's office?

*To Honorable Bryan Willis, State Auditor:*

The county jail is county property, and its operation is a part of the county government. The sheriff as custodian of the prisoners, is much interested in the proper equipment of the county jail, but the duty and responsibility of supplying that equipment rests on the Board of County Commissioners. It is that board's duty to provide the items mentioned in the first question, giving fair consideration to any recommendations of the sheriff in the matter of the selection of such supplies and equipment and the need therefor.

The county jail is not a part of the "office" of the sheriff to be maintained, equipped, and supplied from the fund provided by section 145.05 of the statutes, but is to be maintained from general county funds.

September 3, 1948.—048-287.

#### COUNTY COMMISSIONERS—LEAVE OF ABSENCE—PAY

QUESTION: Under the circumstances outlined below, are two commissioners of Sarasota county entitled to their pay for the time they were granted leaves of absence from their duties as county commissioners?

*To Honorable Thomas L. Glenn, Jr., Attorney for Board of County Commissioners, Sarasota County, Florida:*

Two of the members of the Board of County Commissioners of Sarasota county were indicted by the United States District Court for a crime involving purchases of surplus property in the name of the Board of County Commissioners of Sarasota, Florida. These two commissioners requested leaves of absence from the Board of County Commissioners and same were granted; such leaves were submitted to the governor of the State of Florida and he acquiesced therein; these two commissioners requested these leaves of absence to be without pay, and stated that they would not perform any of the duties of commissioners during such absence. The letter requesting an opinion indicates, and I assume, that these two commissioners were duly cleared of the charges against them.

I know of no authority which said Board of County Commissioners had to grant such leaves of absence and the governor's acquiescence therein would, of course, have no effect thereon.

I consider this question a judicial one pertaining only to said county and for this reason I think the county attorney should advise the board

of its duties therein. If the county attorney has doubts on the subject, then, I would suggest that a declaratory decree be obtained so that the Board of County Commissioners could be certain of their actions.

October 21, 1948.—048-326.

#### ADVERTISING FUNDS—INAUGURAL PARADE

**QUESTION:** Gilchrist county, in its budget for 1948-1949, included only one item for advertising, to-wit, \$250.00 for legal advertising. There is not included in the budget any item, or items, for advertising the advantages of the county. The county is now being asked for, and the commissioners are willing to contribute, if lawful, five hundred dollars for the purpose of preparing and entering a float in the inaugural parade to be held in January when the Honorable Fuller Warren is to be inaugurated Governor of Florida. There is no local law on this subject. Does the Board of County Commissioners have authority under these facts to contribute five hundred dollars for said purpose?

*To Honorable O. Lamar Crocker, County Attorney, Gilchrist County, Trenton, Florida:*

I have diligently sought to find some specific law that would authorize the County Commissioners of Gilchrist county to meet the problem with which they are confronted. However, unless there has been a previous budgeting therefor, within county purposes, I find none.

Some of the counties, I am informed, do have an advertising fund which they use in their discretion for bringing to the attention of the people the advantages of their respective counties. If Gilchrist county can thus properly create such a fund it might do likewise.

Please do not think that I am adverse to Gilchrist county's entering a float in the inaugural parade. Inauguration of a governor is quite an important thing in the state's setup and whatever lends color and beauty to the occasion would be most appropriate.

If there is no opportunity to revamp the budget, might I suggest that the friends of the governor who is to be inaugurated, endeavor to collect, by popular subscription, any deficit in the available money—enough to pay for a suitable float which would show the people of the State of Florida that Gilchrist county is not lagging behind the others in its endeavor to make this inauguration a success.

September 30, 1948.—048-315.

#### VOLUSIA ANTI-MOSQUITO DISTRICT—BORROWING AGAINST ANTICIPATED TAXES

**QUESTION:** Does the East Volusia County Anti-Mosquito District have the authority to borrow \$5,000 for its general operating expense in anticipation of taxes levied on the 1948 tax roll, the amount of which taxes so levied is approximately \$50,000?

*To Honorable J. T. Robertson, Chairman, East Volusia County Anti-Mosquito District, New Smyrna Beach, Florida:*

Section 16 of chapter 18963, special acts of 1937, which is a part of a special law pertaining to said district, reads as follows:

"The board is hereby authorized and empowered in order to carry out the purpose of this act after the levy of taxes in any year, to borrow in anticipation of said levied taxes, a sum not to exceed 50 per cent of the anticipated taxes to be received in accord with the prescribed levy fixed for anti-mosquito purposes for the coming year and to issue its promissory notes therefor

upon such terms and at such rates of interest not exceeding six (6) per cent per annum as said board may deem advisable. Any note so made and issued shall be paid out of any revenues or funds of said board and said notes shall be a charge upon all the revenues and property of said board."

I do not pass upon the constitutionality of this act.

It seems to me that the law speaks for itself and is clear that the district would have the right to borrow the said money which will come out of the current taxes and does not appear to be in excess of the amount limited by the said act.

Attention is called to the fact that this opinion does not have the force and effect of law, and, if such is deemed necessary by the said board, I can only suggest that a declaratory decree be sought and obtained from the courts.

December 20, 1948.—048-364.

#### DEPUTY SHERIFF ATTENDS F. B. I. ACADEMY— EXPENSES—COUNTY FUNDS

**QUESTION:** The sheriff of Marion county has nominated one of his deputies to attend the F.B.I. Academy and such officer has been accepted and enrolled therein. It is necessary that such deputy furnish his own transportation and pay his own living expenses while attending the academy. Assuming that the Board of County Commissioners is willing to do so, may the board pay such expenses of such deputy out of the county fine and forfeiture fund, or any other county fund, as an item of law enforcement?

*To Honorable Edward Porter, Jr., Sheriff, Marion County, Ocala, Florida:*

In my opinion such expense of said deputy may be paid out of the expenses of said office as I consider them legitimate and helpful to law enforcement.

However, I know of no statute which would allow such expenses to be paid by the county commissioners out of county fund, and in the absence of such law, I, therefore, answer the question in the negative.

#### COUNTY HOSPITALS

June 4, 1947.—047-172.

#### BID FOR CONSTRUCTION—LIMITATION—AWARDING CONTRACT

**QUESTION:** Where, under chapter 23264, Special Acts of 1945, the lowest bid for construction of a hospital authorized by the act was approximately seventy thousand dollars in excess of the total amount available for the structure, may the low bidder be awarded a contract for an amount within the funds available for a smaller structure and substitution of some less expensive materials than those specified in the original plans, without readvertising for new bids on the revised plans and specifications?

*To Honorable Chester Bedell, Attorney, Duval County Welfare Board, Jacksonville, Florida:*

Chapter 23264, Special Acts of 1945, authorized the Duval County Welfare Board to construct a hospital for temporary detention and treatment of the mentally ill of Duval county. Section 4 of the act reads as follows:

"Said hospital shall not have in excess of fifty (50) beds; and the cost of such building, equipment and furnishings, insofar



as the cost of same shall be borne by the ad valorem tax herein provided, shall not exceed the amount provided by said tax. The contract or contracts for the erection, equipping and furnishing of said hospital shall be let by contract or contracts upon competitive bidding."

The act authorized acceptance by the Duval County Welfare Board of assistance or grants from the Federal government or others. The act also required the levy of ad valorem tax not in excess of one (1) mill on all real and personal property in the county for the years 1945 and 1946.

The act limits the amount which may be expended by the board to the amount of the tax levy and such other funds as may be received by grants, etc., for the project. The net fund produced by the tax levy and available for the cost of construction amounts to approximately three hundred sixty thousand dollars, and the lowest bid was four hundred thirty-one thousand dollars. The act required competitive bidding.

The plans and specifications as revised in this case to bring the cost within the amount of money available results in a different project from the one for which bids were asked and obtained. There have been no bids on the structure as now planned. As the statute requires competitive bids, it is my opinion that the board can not award a contract to any one without calling for bids on the revised plans and specifications.

Reference has been made to opinions of this office which hold that new bids in such cases are unnecessary. I have made no such ruling. It is true that most, if not all, state contracts for construction awarded in the past year were awarded on bids in excess of the amount appropriated by the Legislature, but under the supreme court ruling those appropriations were not definitely fixed; under the terms of the Building Fund Act, they could be supplemented to whatever extent the Budget Commission found necessary. (See *State vs. Lee*, 27 So. 2d. 84.) There is a very different situation in this case, where there is a fixed limitation on the cost of construction.

## COUNTY DEPOSITORIES

January 28, 1947.—047-34.

### SCHOOL DEPOSITORY—WARRANTS—CERTIFIED LIST

QUESTION: Was that provision of section 136.06, Florida Statutes, 1941, prohibiting county depository banks from paying warrants until they have received from the board certified lists of warrants issued, repealed by section 237.32 of the statutes insofar as it relates to school funds?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 136.06 is a part of a chapter dealing with county depositories of county funds and as originally enacted in 1915 the chapter specifically included school funds. That part of section 136.06 with which your question is concerned reads:

"... and the bank upon which each check or warrant is drawn shall not pay same until it shall receive a certified list from secretary or clerk of board issuing check or warrant, giving date, number and amount of each check or warrant and person to whom issued."

Section 106 of chapter 19355, acts of 1939 (School Code), repealed all laws in conflict therewith.

Section 237.32(6), which is a part of the school code, reads:

"Payment of School Warrants.—It shall be the duty of the county depository, upon presentation to it of the county school

warrants, to pay the same, if there are any funds in its custody applicable thereto."

Section 237.32, enacted in 1939, sets up a complete system for the selection of school fund depositories and for the deposit and withdrawal of school funds from such depositories. It is my opinion that section 237.32 was intended to supersede section 136.06 insofar as the latter related to school funds, notwithstanding the fact that the amended section 136.06 became a law on June 12, 1939, the same day on which section 237.32 became a law.

It is my opinion that school boards are not required to furnish the certified lists of warrants mentioned in section 136.06 and that school depository banks may lawfully pay school warrants without having received such lists.

### COMPENSATION OF COUNTY OFFICIALS

May 30, 1947.—047-145.

#### SHERIFF—PAY DURING SUSPENSION—EARNINGS

QUESTION: The sheriff of Marion county was suspended from his office by the governor for a period of time, he was reinstated by the governor and immediately resigned. To what compensation is the sheriff entitled?

*To Honorable Wallace E. Sturgis, Senate Chambers, Capitol:*

(1) It appears that the yearly compensation of county sheriffs contemplates the calendar year as distinguished from the fiscal year for reason that section 145.03 provides:

"Each county official receiving compensation for his official duties paid wholly or partly by fees or commissions, or fees and commissions, at the expiration of each semi-annual period, to-wit, on June 30th and December 31st of each year, shall file with the board of county commissioners of the county in which he holds said office and exercises its duties, a sworn itemized statement showing in detail the fees and commissions, together with an itemized statement showing the expense of such office, to whom compensation of any kind is paid and the purpose thereof, . . ."

Section 145.04 provides that if each county officer has not made his report, as required in section 145.03, prior to the 15th day of January and the 15th day of July, of each year, that the same shall be grounds for suspending such county officer by the governor, and section 145.05 provides for the annual payment of the excess fees collected by such county officer.

(2) The sheriff's office is a fee office, the compensation paid the sheriff is from a fee and commission basis (chapter 30, Florida Statutes, 1941).

(3) Maximum of salary or compensation allowed county officers, section 145.01, Florida Statutes, provides:

"Each county official whose compensation for his official duties is paid wholly or partly by fees or commissions, or fees and commissions, shall receive as his yearly compensation for his official services from the whole or a part of the fees, or commissions so collected, the following sum only: All the net income from such office not to exceed five thousand dollars; sixty per cent of the next three thousand dollars or any fraction thereof; forty per cent of the next two thousand dollars or any fraction thereof; and twenty-five per cent of the rest and residue thereof; provided, that no such official shall under the foregoing computation of remuneration receive from the income so collected by him more than seven thousand five hundred dollars per year."

Attention is particularly invited to the quoted words: "shall receive as his yearly compensation."

One need not be concerned with the phrase "so collected," for the reason that the Florida Supreme Court has held that it is the office that earns the fee and commission as distinguished from the occupant of the office (Lee vs. Smith, 149 So. 67, 69; Martin v. Karel, 143 So. 317, 322; Tyler v. Thomas, 153 So. 848; Gay v. State, 155 So. 848; Tyler v. Nobles, 161 So. 283; State v. Caruthers, 180 So. 27; Rogers v. Bondy, 182 So. 281).

I do not have the date that the Sheriff of Marion County was suspended from office but probably I can make myself clear in using a hypothetical case, for example: Sheriff "A" occupies the office of sheriff for the months of January, February and March of 1947, but is suspended from office for the months of April, May, June and July. On the first day of September, 1947, he is reinstated to his office but upon his reinstatement he immediately resigns therefrom. Assuming that the office of sheriff netted exactly \$625.00 per month for the first eight months but for the remaining four months the office netted but \$100.00 total or a net total of \$5,100.00 for the office for twelve months, he would, in such a case, be entitled to eight-twelfths of \$5,100.00 and not \$5,000.00 (\$625.00 per month for the eight months). If the particular office has already earned for the year (fiscal or calendar, depending upon which basis the salary of the office is to be computed) \$7,500.00 net or more, you are not confronted with this problem (assuming that the office will meet operating expenses for the balance of the year).

I assume that there is no question in anyone's mind as to the sheriff's being entitled to his salary and compensation because article IV, section 15, provides:

"... No officer suspended, who shall under this section resume the duties of his office, shall suffer any loss of salary and other compensation in consequence of such suspension. . . ."

And our supreme court, in the case of Ex Rel. Williams, v. Lee, 164 So. 536, held that such a suspended officer is entitled to the salary for the period for which he was suspended, irrespective of the amount specified in legislative appropriations of payment of such claims.

In other words, that part of the sheriff's suspension in the year 1946 can be computed by taking the net earnings of the office for the year 1946, up to \$7,500.00 maximum, and pro-rating for the period of suspension. His compensation for his period of suspension for the current year (1947) cannot be determined until the expiration thereof, unless prior to such date, the office has netted a sufficient sum so that there is no doubt as to its ending the year with at least a \$7,500.00 net.

If the sheriff's office operates on a fiscal year, which I do not believe it does, the same rule governs; that is, the part of the suspension period falling within an expired fiscal year can be computed but that part of the suspension falling within an unexpired fiscal year cannot be paid until the expiration thereof unless the net earnings of the office are assured of reaching not less than \$7,500.00 for the fiscal year.

April 1, 1947.—047-91.

#### SALARY FOR SHERIFF—LOCAL BILL

QUESTIONS: 1. Will it be possible to place the sheriff of Marion county on a salary basis, instead of a fee basis as at present; if so, will the enacting measure require publicity here?

2. Will it be possible to increase the salary of county commissioners of Marion county by legislative enactment; if so, what steps are necessary?

*To Honorable C. Farris Bryant, Representative, Marion County, Ocala, Florida:*

In answer to the first question, it will be possible to place the sheriff of Marion county on a salary basis instead of a fee basis, as at present, and one or two of the counties have done this by the passage of so-called "population" statutes; however, I do not pass upon the constitutionality of such statutes, in view of section 20, article III, of our constitution and certain decisions of our supreme court, namely; *State ex rel White vs. Foley*, 182 So. 195; *Manatee county vs. Davidson*, 181 So. 889, and others.

In answer to the second question, I will also say that it is possible to increase the salary of the county commissioners of Marion county by legislative enactment. The Legislature has passed numerous local laws increasing the compensation of county commissioners; however, in view of said section of our constitution, and the said opinions of our supreme court, I do not pass upon the constitutionality of any such statutes.

September 11, 1947.—047-286.

#### SHERIFF'S OFFICE—JAIL—DUTY TO CLEAN JAIL

QUESTIONS: 1. All county offices are kept clean and maintained by the county commissioners by the use of trustees. In view of the fact that the sheriff's offices are located in the Escambia county jail building, whose responsibility and duty is it to keep these offices clean and sanitary?

2. Is it the duty and responsibility of the sheriff to keep the jail clean and sanitary?

3. Is it the responsibility and duty of the sheriff in the aforementioned cases, who is obligated to purchase the necessary supplies, such as, soaps, disinfectants, insecticides, mattresses, sheets, and other bedding, etc.?

4. Should the sheriff make such purchases, and would it be a legal operating expense as far as the sheriff's office is concerned?

*To Honorable R. L. Kendrick, Sheriff, Escambia County, Pensacola, Florida:*

Answering the first question, it is my opinion that primarily it is the duty and responsibility of the sheriff to keep the said offices clean and sanitary. To do this the sheriff is allowed reasonable and necessary expenses, and such expenses should be deducted from the gross income of the sheriff's office. (Section 145.01, Florida Statutes, 1941; *Sparkman v. County Budget Commission*, 137 So. 809.)

The fact that the office is in the jail and not in the court house would have no bearing on the matter.

I think that the second, third and fourth questions are answered by an opinion which I rendered on August 11, 1943, found on pages 176 and 177 of the Biennial Report of the Attorney General for the years 1943-44, which reads in part as follows:

"It is the duty of the sheriff to keep the county jail in a sanitary condition, insofar as it is possible for him to do so with the facilities furnished by the board of county commissioners and by the employment of guards and servants whose pay must not exceed \$2.00 a day and \$1.00 a day respectively, and if such facilities are not available to the sheriff or provided by the board of county commissioners, it is his duty to report to the county commissioners and demand on them whatever is necessary to accomplish this purpose.

"I am of the opinion that it is the duty of the board of county commissioners to see that the county jail is kept in a sanitary



condition, or to keep it themselves or to furnish the sheriff with the facilities for so doing; that in the event either the sheriff or the board of county commissioners fails to do so said sheriff or board is guilty of nonfeasance and neglect of duty and subject to removal from office by the governor."

(Since this opinion was written the pay for the guards and servants has been increased—chapter 22587, paragraph 2, Laws of 1945).

The supplies mentioned in question three are facilities to which reference is made in the quoted opinion, *supra*.

July 13, 1948.—048-227.

#### FEEDING PRISONERS—SHERIFF PAYMENT FUND CHARGED

QUESTION: Out of what county fund should payment be made, by the Board of County Commissioners, for fees to the county sheriff for feeding prisoners awaiting trial on criminal charges, or prisoners serving sentences in the county jail for failure to pay fines or costs adjudged against them?

*To Honorable Sam D. May, County Judge, Chipley, Florida:*

A former provision of law, section 142.14, Florida Statutes, 1941, provided definitely that fees for feeding prisoners should be paid out of the statutory fine and forfeiture fund. This section, however, was repealed by Laws of Florida, 1943, and I assume it was repealed because of the fact that there was in existence at that time section 30.25, Florida Statutes, 1941, which provided for the compensation to be paid the sheriffs for feeding prisoners. Said section 30.25, as amended by chapter 22587, Laws of Florida, 1945, now governs the compensation to be paid the sheriffs for feeding prisoners.

In my opinion the feeding of prisoners, such as you mentioned and which is provided for by said section 30.25, should be paid out of the fine and forfeiture fund as provided by section 142.01, Florida Statutes, 1941, and section 9, article 16 of the constitution.

July 2, 1947.—047-190.

#### ASSESSOR—RETROACTIVE PAY—EFFECTIVE DATE

QUESTIONS: 1. Is the compensation of tax assessor provided by chapter 23731, Laws of 1947, retroactive to January 1, 1947; if not, at what date does it become effective?

2. Where the tax assessor makes an agreement with the Everglades Drainage District to supply the latter with a detailed list of assessments for the drainage district, which agreement was made and list prepared prior to the enactment of chapter 23731, but compensation therefor to be paid in November, 1947, may the tax assessor receive and keep the agreed compensation for preparing the list in addition to his compensation fixed by chapter 23731?

*To Honorable Bryan Willis, State Auditor:*

Chapter 23731 is applicable only to counties of more than 300,000. Section 1 provides that the tax assessor and certain other county officers now paid in whole or in part by fees, salary or commission, shall receive as their yearly compensation for all of their official services from the fees, salary or commission collected, all of the net income from such offices not to exceed ten thousand dollars per annum. Section 2 defines "net income" as the residue of income of the office after deducting all reasonable expenditures for salaries, deputies, clerks, assistants, etc. Section 3 defines "income" as all "receipts of such office from fees, costs and commissions authorized by law, and all other receipts from fees, costs and commissions

on account of any service performed for the state, county, or any municipal government or agency thereof or any other taxing bureau, board or agency wherein any of the personnel or equipment of the office is employed."

The rule is that an act is not retroactive unless by its terms it clearly appears that such was the intention of the Legislature. There is nothing in chapter 23731 indicating such intention. The salary fixed by the act begins on May 22, 1947, the date the act became a law. (See *State ex rel Bayless vs. Lee*, 23 So. (2d) 575.)

Reference is made to my opinion of June 15, 1944, No. 044-170, Biennial Report, page 210, in which I held that the compensation to this same tax assessor for the same service to the Everglades Drainage District under the circumstances therein set out was not such compensation as was required to be included in the tax assessor's return to the county commissioners. It is my opinion that if the work performed this year for the Everglades Drainage District was completed prior to May 22, 1947, the effective date of chapter 23731; and if the personnel performing the work were paid for such work by non-county funds, the tax assessor may receive and retain as his own the agreed compensation for the service and is not required to include it in his return to the county commissioners; even though he receives payment after the effective date of the act.

What is said herein has no application whatever to such services which may be performed by the tax assessor after the effective date of chapter 23731.

I do not pass upon the constitutionality of the act. (See *Manatee county vs. Davidson*, 181 So. 889, and similar cases.)

October 15, 1947.—047-338.

#### ASSESSOR'S OFFICE EQUIPMENT—PAYMENT FOR EQUIPMENT— COUNTY COMMISSIONERS

**QUESTION:** It is my desire to purchase certain equipment for the assessor's office out of the receipts of the office. The office can now afford the purchase of this equipment as a current expenditure. Is such a procedure legal and proper subject to the approval of the Board of County Commissioners?

*To Honorable Ernest C. Nott, Tax Assessor, Marion County, Ocala, Florida:*

Section 145.01, Florida Statutes, 1941, fixes the compensation of the tax assessors and section 145.02 gives a definition of the net income of said office. Section 145.05, Florida Statutes, 1941, reads as follows:

"Each and every such officer shall pay annually hereafter into a special fund all money in excess of the sum to which they are, under the provisions of Section 145.01-145.04, entitled, and as annual compensation herein allowed, the board of county commissioners shall create such fund and shall expend the proceeds thereof for the purpose of equipping, maintaining, and supplying said office, from which said money is derived, with the necessary books, furniture, fixtures and all other things now supplied or furnished by the board of county commissioners and paid for by them from the general revenue of the county; . . ."

In view of this law, it is my opinion that it is the duty of the county commissioners to purchase such equipment as is reasonably necessary for the said office. I feel sure that the county commissioners will consult the tax assessor as to what is necessary, as he would be more familiar with the needs of the office.

June 27, 1947.—047-177.

COLLECTOR—INCREASE IN COMPENSATION—YEAR DUE

QUESTION: The 1947 Legislature passed a local law for Franklin county, setting a minimum of three thousand dollars annual compensation for the tax collector and tax assessor, the act becoming effective immediately when becoming a law. The tax collector made final settlement with the county commissioners on the 1946 tax roll, and collected from them and the school board a total of two thousand three hundred thirty-three dollars and sixty-six cents as commissions on taxes and licenses collected and sold for 1946-1947. Is the collector entitled to the sum of six hundred sixty-six dollars and thirty-four cents, as balance due him on the 1946 tax roll on which he made final settlement on June 19, 1947?

*To Honorable C. C. Melvin, Tax Collector, Franklin County, Apalachicola, Florida:*

I assume that the request for opinion has reference to chapter 24355, Laws of Florida, 1947, which is a population statute affecting counties with a total population of not more than 8,200 nor less than 8,000, according to the state census of 1945.

I notice that this law became effective immediately upon its becoming a law.

There is nothing in the law concerning the increase of the 1946 compensation for the tax collector of Franklin county; therefore, the increase would apply only to the compensation allowed in the year 1947.

It is indicated that the tax collector actually made a settlement of the 1946 tax roll on June 19, 1947, but as a matter of fact, the settlement made on June 19, was as of January 1, 1947.

Under this bill the increase, therefore, will come in the 1947 compensation which will be based on the 1947 tax roll. There is no compensation due the tax collector on the 1946 tax roll which he can claim in consequence of the 1947 act.

October 20, 1947.—047-334.

COUNTY JUDGE'S SALARY—RETROACTIVE PAY—JUVENILE COURT JUDGE

QUESTION: The present county judge of Liberty county has been the county judge since September 4, 1945. On February 3, 1947, the county commissioners, pursuant to section 415.26, Florida Statutes, 1941, began paying said judge twenty-five dollars per month as compensation for his services as judge of the juvenile court and have continued to pay this salary. The county commissioners now feel that the services of the judge from September 4, 1945, to February 3, 1947, as judge of the juvenile court, were worth twenty-five dollars per month, and they are willing to pay this amount, provided they can do so legally. Can the county commissioners pay this salary to the judge of the juvenile court of Liberty county, Florida, from said September 4, 1945, to February 3, 1947?

*To Honorable R. H. Deason, County Judge, Liberty County, Bristol, Florida:*

I do not find any law allowing the county commissioners to, as it were, go back and pay you the salary from September 4, 1945 to February 3, 1947. On the contrary, article 16, section 11, of our constitution could be so interpreted as to absolutely prohibit this.

Section 415.26, Florida Statutes, 1941, in part reads as follows:

"... The county judge shall be paid such compensation as may be fixed by the county commissioners, but in counties having

more than fifty thousand population by the last state or federal census, the compensation of the county judge shall not be less than five hundred dollars annually, to be paid out of the fine and forfeiture funds quarterly."

Acting under this section if the county commissioners feel that such services are now worth more than twenty-five dollars per month, of course, they may increase it. This is entirely in their discretion.

July 16, 1947.—047-212.

#### EXTRA HELP FOR REGISTRATION—COUNTY COSTS— COMPENSATION

QUESTIONS: 1. May the Board of County Commissioners of Hillsborough County lawfully pay for clerical help for the office of supervisor of registration of said county, compensation for such clerical help being in addition to the amounts of four thousand five hundred dollars and two thousand four hundred dollars paid annually to the supervisor and his chief deputy, respectively, provided appropriations therefor are provided in the county budget?

2. Did said Board of County Commissioners lawfully pay the supervisor of registration at the rate of four thousand five hundred dollars a year for the period, June, 1945, to October, 1945?

3. May the chief deputy or other employees in the office of supervisor of registration be paid for "overtime"?

*To Honorable John C. Dekle, Supervisor of Registration, Hillsborough County, Tampa, Florida:*

A recent audit of said supervisor's office held irregular certain payments of money by the Board of County Commissioners for purposes reflected in the foregoing questions. No attempt is made here to consider such questions other than in their relation to the law as it presently exists.

The provision of the general law relating to compensation of supervisors of registration and of district registration officers (section 98.17, Florida Statutes, 1941) do not apply in Hillsborough county. Chapter 22909, Laws of Florida, acts of 1945, provided a salary for the supervisor of "not less than Four Thousand Five Hundred Dollars per annum; payable in equal monthly installments, in addition to other compensation now allowed by law for the services as such Supervisor of Registration." Attention is directed to section 6, chapter 21706, acts of 1943, and section 9, chapter 19547, acts of 1939, for previous compensation provisions. It is here pointed out that the "other compensations now allowed by law" to the supervisor, according to his statement amounted to the total of one thousand eight hundred sixteen dollars for the three years of 1945, 1946 and 1947, or an average of approximately six hundred dollars per year.

Said chapter 19547 provided for employment by the county commissioners of a chief deputy at "a minimum salary of two thousand four hundred dollars per annum," payable in monthly installments of two hundred dollars each; and said chapter 21706 amended such provision to authorize the supervisor to appoint a chief deputy "at a salary of not exceeding twenty-four Hundred Dollars per annum," payable monthly by the county commissioners. None of the three acts mentioned specifically authorized the county commissioners to pay for additional clerical help for such office.

According to information furnished by the supervisor, it appears that the appropriation for the fiscal year ending September 30, 1947, was four hundred dollars for supplies for such office; and the following salaries: supervisor, four thousand five hundred dollars; chief deputy, two thousand four hundred dollars; deputy supervisor, two thousand one hundred dollars; office deputies, two thousand five hundred dollars. It is assumed without



June 27, 1947.—047-177.

COLLECTOR—INCREASE IN COMPENSATION—YEAR DUE

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more than fifty thousand population by the last state or federal census, the compensation of the county judge shall not be less than five hundred dollars annually, to be paid out of the fine and forfeiture funds quarterly."

Acting under this section if the county commissioners feel that such services are now worth more than twenty-five dollars per month, of course, they may increase it. This is entirely in their discretion.

July 16, 1947.—047-212.

#### EXTRA HELP FOR REGISTRATION—COUNTY COSTS— COMPENSATION

QUESTIONS: 1. May the Board of County Commissioners of Hillsborough County lawfully pay for clerical help for the office of supervisor of registration of said county, compensation for such clerical help being in addition to the amounts of four thousand five hundred dollars and two thousand four hundred dollars paid annually to the supervisor and his chief deputy, respectively, provided appropriations therefor are provided in the county budget?

2. Did said Board of County Commissioners lawfully pay the supervisor of registration at the rate of four thousand five hundred dollars a year for the period, June, 1945, to October, 1945?

3. May the chief deputy or other employees in the office of supervisor of registration be paid for "overtime"?

*To Honorable John C. Dekle, Supervisor of Registration, Hillsborough County, Tampa, Florida:*

A recent audit of said supervisor's office held irregular certain payments of money by the Board of County Commissioners for purposes reflected in the foregoing questions. No attempt is made here to consider such questions other than in their relation to the law as it presently exists.

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According to information furnished by the supervisor, it appears that the appropriation for the fiscal year ending September 30, 1947, was four hundred dollars for supplies for such office; and the following salaries: supervisor, four thousand five hundred dollars; chief deputy, two thousand four hundred dollars; deputy supervisor, two thousand one hundred dollars; office deputies, two thousand five hundred dollars. It is assumed without

question that such estimate of expenses was considered necessary for the operation of said office by the county commissioners and/or the budget commission.

It is recognized as the general rule that unless authorized by statute, the compensation of clerical help in an office must be paid from the emoluments of such office. Another general rule is that compensation is not a necessary incident of a public office, and that the amount, net or otherwise, is controlled by statute.

The registration of electors is a matter of extreme importance recognized by our constitution (article VI, section 1), which provides specifically therefor (article VI, section 2). It, apparently, was determined by the county commissioners and/or the budget commission of said county that in addition to the services of the supervisor and chief deputy, a total of four thousand six hundred dollars was required for the current fiscal year for clerical help for the proper carrying out of the constitutional functions of this public office. It is pointed out that said chapter 22909 did not limit the compensation of the supervisor, payable by the county commissioners, to four thousand five hundred dollars per annum. It is reasonable to conclude from the provisions of said chapters 19547, 21706 and 22909, that it was the legislative intent that the office of this supervisor should be maintained adequately to perform the duties contemplated and that the supervisor should be compensated commensurately with his services and responsibilities.

In view of the foregoing, in my opinion the questions are answered in their numerical order as follows:

(1) It appears that provision could be made for increase of the annual compensation for the supervisor to such amount as might be determined necessary to include therein reasonable compensation for clerical help essential for the proper functioning of the supervisor's office. While this was not done in the current budget, the effect of what was done is the same, and hence what was done would seem to be within the spirit and intent of the applicable law. Additional clerical help to the extent of compensation finally determined by the budget commission may be employed and paid by the county commissioners within the limits of amounts appropriated therefor.

(2) Chapter 22909 increased from four thousand two hundred dollars to four thousand five hundred dollars the minimum annual compensation payable by the county commissioners to the supervisor of registration, beginning with October 1, 1945. Unless, under the authority of section 6 of said chapter 21706, the compensation payable by the county commissioners to the supervisor was raised from the four thousand two hundred dollars minimum found there to four thousand five hundred dollars, and the increased amount was duly carried in the budget for the fiscal year ending September 30, 1945, there was no authority for the county commissioners to pay the supervisor at the rate of four thousand five hundred dollars per annum for the period June, 1945, to October, 1945.

(3) The salary of the chief deputy shall not exceed two thousand four hundred dollars per annum; and any payment as overtime or otherwise resulting in annual compensation in excess of such amount are not authorized. The compensation of additional employees of the supervisor's office is limited by the amounts appropriated for such purposes; and whether such employees are paid at a higher rate during periods considered "overtime" would seem to be immaterial, since the total payable in any one year is limited as stated.

February 5, 1947.—047-30.

#### COUNTY PROSECUTOR—FEES—BONDS

QUESTIONS: 1. Can a county prosecuting attorney properly charge a prosecutor's fee in a case where upon arraignment for preliminary hear-

ing defendant enters plea of guilty and is bound over to either county court or state attorney for further prosecution?

2. Is the county prosecuting attorney entitled to a fee in the justice court when he does not draw the affidavit and does not appear for preliminary hearing?

3. When the sheriff or constable, as arresting officer, arraigns a prisoner, receiving therefor a fee of five dollars, and the prisoner pleads guilty, should this five dollar fee be charged as cost to the defendant only, or should it be paid by the county out of fine and forfeiture fund? If defendant does not pay it, can it be charged against the fine and forfeiture fund?

4. (a) When an appearance bond is taken, or preliminary hearing is taken, for appearance of a prisoner to trial before the trial court and he makes a bond, who holds his appearance bond, the arresting officer or the clerk of the court where the appearance is to be made?

(b) Who is entitled to receive the two dollars for approving the bond, the arresting officer or the judge?

5. When the judge or arresting officer accepts an appearance bond to a trial court from a defendant upon preliminary hearing, who is responsible for the defendant's appearing in the trial court, the officer taking the bond or the bondsman?

6. When a bond is estreated for non-appearance for trial, who does the estreating, the arresting officer or the judge; and who should be paid therefor?

7. Should a justice of the peace arraign a defendant and give him a chance to be heard or should he bind him over without arraignment?

8. When a defendant, upon preliminary hearing, enters a plea of guilty, or waives preliminary hearing and is bound over to court for trial, is any constructive fee chargeable for the prosecuting attorney, or, even if the prosecuting attorney appears when the defendant appears before the magistrate for the preliminary hearing, is the prosecuting attorney entitled to charge any fee under such circumstances?

*To Honorable W. A. Mapoles, Justice of the Peace, Third District,  
Okaloosa County, Crestview, Florida:*

The foregoing questions are answered in their numerical order.

(In answer to questions 1 and 2, I assume that the county prosecuting attorney to which reference is made, is one employed by the county commissioners under section 125.03, Florida Statutes, 1941, and his compensation is provided by section 125.04, Florida Statutes, 1941.)

(1) Said section 125.04, Florida Statutes, 1941, in providing for the compensation of such attorney says that the same shall "be not less than three hundred dollars or more than six hundred dollars per annum . . . and in addition thereto said attorney shall be entitled to and shall receive the same fees for convictions as are now or may hereafter be provided by law for attorneys in county courts as conviction fees in cases prosecuted before county courts. Said conviction fees to be taxed as part of the cost in each case in which such conviction shall be had before the court of the county judge."

(2) In my opinion, the said fee is dependent upon a conviction; there has been no conviction where preliminary hearing only is had and defendant has been bound over for prosecution. Therefore, I answer questions one and two in the negative.

(3) I assume that the fee mentioned for the arrest of the prisoner as provided in chapter 22587, Laws of 1945, as a sheriff or a constable cannot at any time arraign a prisoner.



Section 939.02, Florida Statutes, 1941, says: "All costs accruing before a committing magistrate shall be taxed against the defendant on conviction or estreat of recognizance."

The fee for the arrest is to be taxed by the trial court and not by the committing magistrate, for example, by the circuit court if the prisoner is bound over to that court and is convicted therein, or his bond is estreated by said court.

(4) (a) In my opinion, the clerk of the court to which the prisoner is held to answer by the justice of the peace should hold the bond, especially in view of section 903.26, Florida Statutes, 1941, which says in part:

"(1) If there is a breach of the undertaking, the court before which the cause is pending shall make a record thereof and shall declare the undertaking, and any money or bonds that have been deposited as bail, forfeited.

"(2) Upon said undertaking being forfeited, the clerk of the trial court shall immediately transmit the undertaking and any affidavits . . . to the clerk of the circuit court of the county in which said undertaking and affidavits are filed . . ."

(b) Section 903.34, Florida Statutes, 1941, paragraph (2), says:

"In all criminal cases instituted or pending in the courts of county judges or justices of the peace or other committing magistrates, all bonds given by defendants therein at any time before the trial, shall be approved by the sheriff, county judge, justice of the peace, or other judge trying the case, as the case may be; and all bonds given by defendant after preliminary hearing shall be approved by the sheriff, county judge, justice of the peace or other committing magistrates, except appeal bonds . . ."

If the sheriff approves such a bond, he is entitled to the fee and if the justice of the peace approves said bond, he is entitled to the fee.

If the sheriff writes, takes and approves such a bond his fee is two dollars (see chapter 22587, Laws of Florida, 1945). If the justice of the peace approves such a bond his fee is one dollar (see sections 81.26 and 28.24, Florida Statutes, 1941).

(5) The bondsmen are responsible if the arresting officer or judge has taken a bond which meets the requirements of the law.

(6) Section 903.26, Florida Statutes, 1941, says:

"(1) If there is a breach of the undertaking the court before which the cause is pending shall make a record thereof and shall declare the undertaking and any money or bonds that have been deposited as bail, forfeited."

The proceeding on the estreature of bonds is provided for in sections 932.45 and 932.46, Florida Statutes, 1941.

If the prisoner is admitted to bail for his appearance for a preliminary examination and he forfeits the undertaking, the justice of the peace may estreat the bond. If the bond is given by the prisoner after he has been held to answer by a magistrate, the bond shall be estreated by the court in which he may be prosecuted.

If the justice of the peace declares the forfeiture, his fee will be the same as for entering any other order by him.

(7) Section 902.04, Florida Statutes, 1941, says:

"(1) If the defendant does not request the aid of counsel, the magistrate shall immediately proceed to examine the case unless the defendant waives examination.

"(2) If the defendant requests the aid of counsel, the magistrate shall, immediately after the appearance of counsel, or, after waiting a reasonable time therefor, if none appears, proceed to examine the case unless the defendant waives examination."

I think this section will answer the question.

(8) The answer to this question and the reasons therefor are the same as set forth in the answers to questions 1 and 2.

October 16, 1947.—047-333.

#### COUNTY ATTORNEY—CONVICTION FEE—PLEA OF GUILTY

QUESTIONS: 1. Is an attorney employed by the county commissioners as provided by section 125.03, Florida Statutes, 1941, entitled to a conviction fee if the person charged with crime pleads not guilty and later is either found guilty or changes his plea at the preliminary hearing?

2. Is such an attorney entitled to a conviction fee if a person charged with crime pleads guilty on first arraignment?

*To Honorable Hiram Faver, Clerk and Auditor, Board of County Commissioners, St. Johns County, St. Augustine, Florida:*

A careful reading of section 125.04, Florida Statutes, 1941, which regulates the compensation of such an attorney, provides for a fee to such attorney of five dollars for conviction; therefore, if a person charged with crime pleads "not guilty" and is later found guilty, he is convicted of a crime and the said prosecuting attorney is entitled to a five-dollar fee for such conviction.

As to the change of plea at a preliminary hearing, I assume that reference is made to a preliminary hearing to determine whether or not the person charged with crime should be held to answer the offense (section 902.14, Florida Statutes, 1941). Should the person charged plead guilty at such a hearing, this in itself is not a conviction and the prosecuting attorney is not entitled to a conviction fee of five dollars.

Answering the second question, I will say that even if the person pleads guilty on first arraignment, this in itself is not a conviction and the prosecuting attorney is not entitled to a fee therefor.

September 22, 1947.—047-311.

#### COUNTY PROSECUTOR—RIGHT TO CONVICTION FEES

QUESTION: Is the county prosecuting attorney entitled to a fee in all cases (except estreatment of bonds) regardless of whether the defendant is convicted or not?

*To Honorable Hiram Faver, Clerk and Auditor, The Board of County Commissioners, St. Johns County, St. Augustine, Florida:*

Section 125.04, Florida Statutes, 1941, in part, reads as follows:

"The compensation of the attorney so employed by the county commissioners as provided by section 125.03 shall be not less than three hundred dollars or more than six hundred dollars per annum, payable monthly, and in addition thereto said attorney shall be entitled to and shall receive the same fees for conviction as are now or may hereafter be provided by law for attorneys in county courts as conviction fees in cases prosecuted before county court."

In my opinion the language of this statute is clear that such a prosecuting attorney is entitled to the fee only when the party charged with the crime is convicted.

I assume that there is no special law on this matter.

April 8, 1948.—048-127.

#### OVERTIME PAY—COMPUTING RETIREMENT RATE

**QUESTION:** Where employees, within the county officers and employees' retirement system, are paid overtime pay for additional work performed, should such overtime pay be included in determining their average final compensation?

*To Honorable C. M. Gay, State Comptroller:*

Doubtless the county officers and employees' retirement statute contemplates compensation legally paid and should not be construed as including compensation illegally paid. "Average final compensation" is defined by the said retirement statute as "the average cash compensation of an officer or employee during his last ten years of service." (Section 134.01, Cumulative Supplement, Florida Statutes, 1941.) I, therefore, presume that the overtime pay mentioned in the request for opinion was compensation legally paid to the employee in question from county funds. Retirement pay is "based upon the average final compensation," and overtime pay, if legally paid from county funds, being part of the said compensation, should be considered in determining the retirement benefits of such employee.

Before such overtime pay may be considered in determining the said retirement benefits, contributions based thereon should have been made to the retirement fund as on other compensation to the employee in question.

September 11, 1947.—047-307.

#### EMPLOYMENT BY CITY—EFFECT ON RETIREMENT—BENEFIT OF RETIREMENT

**QUESTION:** Is membership on the governing body of a municipal corporation within this state, to be construed as employment by any political subdivision of this state so as to be within the prohibition contained in section 134.14, Cumulative Supplement to Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

Said section 134.14, Cumulative Supplement to Florida Statutes, 1941, provides in part that "any person accepting or receiving the benefit of retirement compensation under this chapter shall not be employed in any capacity by the State of Florida, or any political subdivision, department, branch or agency thereof and any person accepting or enjoying the benefits of retirement compensation under this chapter who accepts such employment or receives any other compensation from the State of Florida or any political subdivision, department, branch or agency thereof for services rendered shall forfeit all the benefits of this chapter forever . . ."

In construing section 134.14, one must ascertain the intention of the Legislature when it used the term "State of Florida or any political subdivision, department, branch or agency thereof," in said section. (*Jackson v. Edwards*, 144 Fla. 187, 197 So. 833, text 834.) The history of the said statute, the evil to be corrected by it, the intention of the Legislature, the subject regulated and the object to be obtained should be considered. (*Scarborough v. Newsome*, 150 Fla. 220, 7 So. 2d 321, text 323.)

Although there may be some doubt whether a municipal corporation is a political subdivision of the state (*City of Tampa v. Easton*, 145 Fla. 188, 198 So. 753, text 754 and *Keggin v. Hillsborough county*, 71 Fla. 356, 71 So. 372, text 373), it has been defined as an agency (*Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763), a department (*Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446; *Bissell v. Jeffersonville*, 24 How. 287, 16 L. Ed. 664) or subordinate branch (*Nashville v. Ray*, 19 Wall. 468, 22 L. Ed. 164) of the state. It has been called an arm of the state (*Owens-*

boro v. Commonwealth, 105 Ky. 344, 49 S. W. 320, 44 L. R. A. 202). See Kaufman v. City of Tallahassee, 84 Fla. 634, 94 So. 697, text 698, where question of whether or not a municipality is an agency of the state was mentioned but not decided.

Although membership on a city council of a municipality may not be employment by a political subdivision in a strict sense, it would seem to be employment by a department, branch or agency of the state.

September 20, 1948.—048-304.

#### HOLDING TWO OFFICES UNDER THE STATE GOVERNMENT AT THE SAME TIME, ILLEGAL

**QUESTION:** Is it legal for one person to hold the office of juvenile probation officer, appointed by the governor, for Nassau county, salary \$37.50 monthly, and at the same time hold the office of constable, elected by the people, for district No. 1, Nassau county, salary on a fee basis?

*To Honorable C. P. Rutishauser, Juvenile Probation Officer, Nassau County, Fernandina, Florida:*

Article 16, section 15, of the Constitution of Florida provides in part as follows:

"... no person shall hold, or perform, the functions of, more than one office under the government of this State at the same time; Provided, Notaries Public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office."

A juvenile probation officer is a county officer. (State ex rel. Gibbs v. Martens, 193 So. 835.)

A constable is a county officer elected by the people. (Article 8, section 6, of the constitution.)

In view of the said article 16, section 15, set forth herein, it is my opinion that the question should be answered in the negative.

December 14, 1948.—048-358.

#### CONTRACT—CLERK OF CIRCUIT COURT— INDEXING OLD RECORDS

**QUESTION:** A clerk of the circuit court agreed with the board of county commissioners, for a lump sum, to reindex and copy old indices of county records which were in bad condition. The work was done at odd times and after office hours. Is the contract price paid to the clerk for such work income within the meaning of section 145.01 and 145.02, Florida Statutes, 1941?

*To Honorable Bryan Willis, State Auditor, Tallahassee, Florida:*

Inasmuch as the bad condition of the indices or their absence was not due to the default, negligence or carelessness of the clerk or his deputy, the sum paid to him for the reindexing and other work agreed to be done under his special contract with the county commissioners is not a part of the income of the clerk's office within the meaning of chapter 145. For the same reason the clerk is not entitled to credit for any public moneys which he may have paid to deputies or others who may have performed any of this work of reindexing for him. Such compensation of assistants should be paid from personal funds of the clerk.



### COUNTY OFFICERS AND EMPLOYEES' RETIREMENT SYSTEM

May 7, 1948.—048-158.

#### PARTICIPATION TWO RETIREMENT SYSTEMS PROHIBITED

**QUESTION:** Is it permissible for an employee of Duval county to be a member of the county officers and employees' retirement system (chapter 22938), and Duval county employees retirement fund (chapter 23259), at the same time?

*To Honorable J. Henry Blount, Attorney for County Commissioners, Jacksonville, Florida:*

Both acts were passed in the 1945 session of the Legislature. The county officers and employees' retirement act provides in section 17 that the act "shall not operate to repeal . . . any retirement acts enacted during the present session of the legislature of the State of Florida, nor to affect the rights of any person enjoying the benefits or entitled to enjoy the benefits of such . . . acts."

As originally enacted, there was nothing in either of those two acts which specifically prohibited a Duval county employee from belonging to both at the same time, but had the question been raised there is little doubt that it would have been necessary to read into them an implied prohibition based upon great improbability of a legislative intent to permit two separate and distinct, but concurrent and cumulative pensions, to the same employee for the same period of public service.

But be that as it may, the 1947 Legislature eliminated any doubt when, in chapter 23959, amending section 4 of chapter 22938 (section 134.04, Cum. Supp.), it added the following proviso:

" . . . provided, however, that this Act shall not be compulsory as to any officer or employee of any county having a county retirement system, and provided further, however, that no officer or employee of a county having such county retirement system shall participate in both the retirement system herein provided and also in such county retirement system."

May 22, 1948.—048-183.

#### APPROPRIATION—MAXIMUM LIMIT—UNEXPENDED BALANCE

**QUESTION:** Does the unexpended balance in the annual appropriation provided in section 8 (a), chapter 23959, Acts of 1947, section 134.11, Cum. Supp., revert at the end of the year, or may it be carried over for expenditure in the succeeding year?

*To Honorable C. M. Gay, State Comptroller:*

On June 30, 1946, in opinion 046-328, I construed the corresponding provision in chapter 22938 of the Laws of 1945, which, for the purposes of this inquiry, was identical with section 8 (a) of chapter 23959, Laws of 1947. In that opinion, I said:

"The act does not appropriate twenty thousand dollars for administration expense during the first year. There was appropriated only so much of twenty thousand dollars for the first year of administration as should be necessary to efficiently administer the act during the first year. The provision as to twenty thousand dollars was merely a maximum limit. Accordingly, there is no unexpended balance to be carried forward into the second year."

What was said in that opinion applies with equal force to the aforementioned 1947 statute. The unexpended balance reverts.

September 15, 1948.—048-303.

#### RETIREMENT SYSTEM—PURCHASE OF BONDS—REGISTRATION

**QUESTION:** May bonds purchased with funds of the County Officers and Employees' Retirement System be legally registered under the following designation: "Board of Trustees of County Officers and Employees Retirement System authorized by Chapter 22938, Laws of Florida, 1945?"

*To Honorable C. M. Gay, Supervisor, County Officers and Employees' Retirement System, Tallahassee, Florida:*

On June 21, 1948, official attorney general's opinion 048-206 designated an approved description of the holder for the registering of government bonds purchased with funds of the County Officers and Employees' Retirement System for investment, which designation was in accord with circular No. 530, section 315.5 (b) (2), United States Treasury Regulations.

In the light of the objection interposed by the United States Treasury Department to the employment of the aforesaid approved designation, the question presented is answered affirmatively.

The former official opinion referred to is superseded by this opinion to the extent indicated.

November 24, 1948.—048-347.

#### EMPLOYMENT BY MUNICIPALITY AFTER RETIREMENT FROM STATE OR COUNTY

**QUESTION:** May a person who has retired under the provisions of the county officers and employees' retirement system accept an office, or employment, with a municipality in the State of Florida without forfeiting all benefits under said law?

*To Honorable C. M. Gay, State Comptroller:*

The request for opinion refers to my opinion of July 29, 1948, No. 048-256, construing section 121.14, wherein I held that one who has retired under the state officers and employees' retirement system might accept an office or employment with a city in the State of Florida without forfeiting the retirement benefits under the retirement system. In that opinion I pointed out that while the courts have held a municipal corporation to be an agency of the state for some purposes, it was not so intended in section 121.14, or at least it was very doubtful; and in view of the severe penalties, that is, forfeiture of all benefits, it was not to be so construed.

Section 134.14 of the county officers and employees' retirement act reads as follows:

"Persons receiving retirement compensation not to be employed.—Any person accepting or receiving the benefit of retirement compensation under this chapter shall not be employed in any capacity by the State of Florida or any political subdivision, department, branch or agency thereof and any person accepting or enjoying the benefits of retirement compensation under this chapter who accepts such employment or receives any other compensation from the State of Florida or any political subdivision, department, branch or agency thereof for services rendered shall forfeit all the benefits of this chapter forever and the state comptroller shall forthwith strike such person's name from the retirement compensation roll and refuse to honor any requisitions for retirement compensation made by such person." (Laws 1945, chapter 22938, section 14.)

It will be observed that the county act, section 134.14, prohibits employment after retirement in any capacity by "the State of Florida or any political subdivision, department, branch or agency thereof." The corresponding section of the state officers and employees' retirement act, section 121.14, construed in the opinion of July 29, prohibits employment by "the State of Florida or any department, branch or agency thereof."

The difference is the inclusion of the words, "political subdivision," in the county officers and employees' act, and that is a very material difference. Under Florida Statutes, 1941, section 1.01, a city is a political subdivision of the state. There appears to be no room for construction. Under the clear and unmistakable wording of the county officers and employees' retirement act, quoted, the question must be answered in the negative.

## CHAPTER XI

### CITIES AND TOWNS

#### ORGANIZATION AND DISSOLUTION OF MUNICIPALITIES

January 31, 1948.—048-30.

##### REGISTRATION—DUTY OF SUPERVISOR—PROXY VOTES

QUESTIONS: 1. What official duty, if any, devolves upon the supervisor of registration of Dade county in connection with the organization of a municipality in pursuance of the provisions of sections 165.03 and 165.04, Florida Statutes, 1941, as amended? (See chapter 23656, Laws of Florida, acts of 1947.)

2. At such election, may ballots be cast by proxy or absentee ballots?

*To Honorable Carl Holmar, Jr., Supervisor of Registration, Dade County, Miami, Florida:*

The request for opinion specifically refers to the proceedings contemplated by sections 165.03 and 165.04, as amended. It is here assumed that there is no law particularly applicable in Dade county, inconsistent with the provisions of sections 165.03 and 165.04, as amended, bearing upon this subject; and this opinion is conditioned upon such assumption.

The provisions of sections 165.03 and 165.04, as amended, do not appear to contemplate that the matters to be determined at the meeting in pursuance of these sections and required for the organization of a municipality, shall be decided by regular election processes involving polling places, election boards, etc. Section 165.04, as amended, provides that such matters be decided "at the time and place designated in the notice" by the required "male and female inhabitants who are freeholders and registered voters present, being not less than two-thirds of those whom it is proposed to incorporate, and not less than twenty-five in number . . ."

Thus, it appears that the matters to be determined by section 165.04, as amended, shall be decided by those "present" at such meeting.

In view of the foregoing, in my opinion the questions are answered as follows:

(1) The supervisor of registration appears to have no official duties in connection with the voting upon the matters required to be done and decided at a meeting held in pursuance of sections 165.03 and 165.04, as amended. It is recognized, of course, that he might be called upon to furnish for the purposes of the meeting to interested parties the names of freeholders and registered electors residing in the affected area as evidenced by registration records of Dade county.

(2) Since it appears that the matters and things to be done and decided at a meeting held in pursuance of sections 165.03 and 165.04, as amended, must be decided and done by those described as qualified in these laws and present at the meeting, the casting of proxy or absentee votes would seem to be precluded. Hence, this question is answered in the negative.

#### POWERS OF MUNICIPALITIES

September 18, 1947.—047-308.

##### MUNICIPAL AUDIT—PAYMENT OF COST—PETITION FOR AUDIT

QUESTION: May the governor, under the provisions of section 167.61, Florida Statutes, 1941, authorize and direct the comptroller by



himself or someone appointed by him, to examine into the affairs of the financial department of the city of Maccleny, in Baker county, Florida, at the state's expense?

*To Honorable Millard F. Caldwell, Governor:*

The request for this opinion is construed as being concerned with the question of whether or not an examination of the financial department of the aforementioned municipality, in pursuance of section 167.61, may be done at the expense of the state. This opinion is limited to that question.

Section 167.61 specifically provides that "the expense of any such examination shall be paid for by the municipality."

The case of *Coen vs. Lee*, 116 Fla. 215, 156 So. 747, seems to be the only case in which our supreme court has considered this section. In the original majority opinion the court held that, "If the 'competent person or persons' appointed by the comptroller to make the statutory examinations be among the appointees, agents or employees of the comptroller whose appointment is duly authorized and whose compensation is fixed or limited by law, such regulated compensation for service duly rendered in making the examinations, together with the incidental expenses allowed by law, when duly audited become authorized expenses which under the statute 'shall be paid by said municipality'." On rehearing, however, the majority of the court while not receding from the opinion theretofore rendered nor the conclusion theretofore expressed, stated that the court "nevertheless will leave open for future reconsideration and determination, in a proper case requiring a decision of that question, whether or not the statute attacked in this case will support a recovery against a municipality to pay the expenses of examinations made pursuant to" said section 167.61.

In view of the foregoing, in my opinion the question is properly answered as follows:

As stated, section 167.61 requires the municipality "to pay the expenses of any such examination"; and there appears to be no provision therein or in any other law which specifically evidences legislative intent to appropriate funds of the state to pay for such an examination. While the court in the aforementioned case did not decide whether or not under proper circumstances a municipality could be required to pay the expense of such an examination, in view of the quoted positive language of the statute and in the absence of further expression of the court upon the point, it would seem reasonable to assume the position that no authority exists for the state to defray the cost of such an examination. It is further remarked that the use of state funds for such a local purpose might offend constitutional limitations respecting the use of such funds.

In view of the question presented, the sufficiency of the petition purporting to have been executed by certain taxpayers and electors of the town of Maccleny and addressed to the governor is immaterial. However, two features thereof are mentioned. The descriptive words in the petition "taxpayers and electors" do not have the same meaning as "taxpaying electors" as such latter words are used in the statute here involved. It is further remarked that any certificate attached to a petition executed by "taxpaying electors" as contemplated by said section 167.61, concerning the percentage of such described persons signing the same, should be executed by the officer in charge of the registration books used in connection with elections in said city.

## POLICE POWER OF MUNICIPALITIES

June 26, 1948.—048-213.

### PROCESS—MUNICIPAL COURT—SHERIFF

QUESTION: At times deputy sheriffs have been called upon by police officers, of the municipal court of Fort Lauderdale, to serve warrants for

arrest of persons charged with violation of a city ordinance, when the person charged was without the territorial limits of the municipality, but within the limits of Broward county. May the sheriff or one of his deputies lawfully serve such process?

*To Honorable Walter R. Clerk, Sheriff, Broward County, Ft. Lauderdale, Florida:*

Section 168.03, Florida Statutes, 1941, reads as follows:

"Process of Municipal court; by whom executed. The process of the mayor's court, or other municipal courts, of the cities and towns within the State of Florida shall extend to and may be served anywhere within the territorial limits of the county in which said city, or town, is located, and all summons, subpoenas, warrants, and other process of the mayor's court, or other municipal courts, may be served and executed by the city or town marshal, his deputies, or other executive officer of such courts, anywhere within the territorial limits of the county within which the court issuing the same is located."

I find no statute giving authority to the sheriff or any of his deputies to serve processes of such municipal court.

This opinion, of course, is based upon the general laws of the state and if the charter of the city of Fort Lauderdale does give, or does attempt to give, such authority to the sheriff, you may advise me of the fact and I shall be glad to consider the matter further.

### TERRITORIAL LIMITS

June 3, 1947.—047-146.

#### EXPANSION OF LIMITS—ELECTIONS

QUESTION: What is the legislative authority with regard to annexation of territory to existing municipalities?

*To Honorable Neil C. McMullen, Member of Legislature:*

Under constitutional authority (article VIII, section 8, article III, section 24), the Legislature has plenary power over municipalities except as restrained by the constitution. (*Town of Palm Beach v. Valhos*, 15 So. 2d, 839.)

There are two general statutes regulating the annexation of territory to municipalities. Section 171.04, Florida Statutes, 1941 (chapter 3163, Laws of 1879), specifically provides for the holding of two referendum elections on the same day, one within the existing territory and the other within the territory to be annexed, as a condition precedent to the extension of municipal limits. Under this statute, such election shall carry by a two-thirds majority of the voters actually voting in each of the districts. Section 171.05, Florida Statutes, 1941 (chapter 5464, Laws of 1905), provides for the extension of city limits in cities having a population of more than 10,000 inhabitants upon the approval of an annexation ordinance by a vote of two-thirds of the votes cast at an election to be held on the subject by the qualified voters of the entire territory proposed to be included within the corporate limits. This statute is permissive only.

The constitutionality of section 171.04 was upheld in *State v. City of Homestead*, 130 So. 28. I do not find that the court has passed upon the constitutionality of section 171.05.

These two statutes being general in their nature are not applicable to a municipality created by special act of the Legislature. (*State v. City of Homestead*, supra.)

The City of Tampa, created by special act of the Legislature which defined its boundaries, may by act of the Legislature be authorized to extend its corporate limits by any procedure which the Legislature may prescribe; subject, however, to a referendum vote. In the enabling act the Legislature may constitutionally provide for a referendum vote of approval by the voters within the entire proposed municipal territory, or it may provide for a referendum vote of approval by the voters within the present territorial limits and the separate vote of approval of the electors within the territory sought to be annexed in separate elections held on the same day as is provided for in section 171.05 referred to, *supra*. With regard to the proposed legislation governing the City of Tampa, which is incorporated by special act, the special act authorizing annexation would be required, to meet the requirements of the constitution as to publication, to contain a provision for a referendum vote at an election or elections to be held in such manner as the Legislature may consider to be appropriate and proper, which referendum would take the place of publication.

The Legislature may constitutionally, as a condition upon the authority of the city to annex the proposed territory, impose a limitation upon the power of the city to levy taxes upon the property lying within the annexed territory and upon the residence thereof, whether *ad valorem*, excise, license, or otherwise, as detailed in the inquiry of this date.

## CHAPTER XII

### TAXATION AND FINANCE

#### GENERAL TAXATION PROVISIONS

April 30, 1948.—048-148.

##### DRAINAGE DITCH OR CANAL—OWNED BY INDIVIDUALS — AD VALOREM TAXES

**QUESTION:** Is the drainage canal or ditch, purchased by certain individual land owners, and used for the purpose of draining their lands which are not within any drainage district, subject to ad valorem real estate taxes?

*To Honorable C. M. Gay, State Comptroller:*

The following facts appear in the request for opinion and the comptroller's file exhibited with said request:

(1) The drainage ditch in question was formerly established and owned by a drainage district; (2) it is the boundary line between two existing drainage districts; (3) it was sold by the drainage district to the present owner; and (4) it is used to drain water from the lands of its owner not within either of said drainage districts.

I am presuming that the drainage district which sold the said drainage ditch to the present owners was duly empowered to sell and transfer the same. There being no facts showing otherwise, I am also presuming that the conveyance from the drainage district to the present owners included the right of way for the same and the bed thereof, so that title to said right of way and bed is now vested in them. The said drainage ditch, with its right of way and bed, appears to be property of its owners, and subject to taxation (see section 192.01, Florida Statutes, 1941; Bancroft Investment Corporation v. City of Jacksonville, 157 Fla. 546, 27 So. 2d. 162, text 170), unless exempt for some reason. There appears nothing from the request or the file exhibited therewith that in any way indicates that the property in question is entitled to exemption.

The question should be answered in the affirmative.

July 16, 1947.—047-200.

##### FOREIGN CORPORATION—LOAN APPLICATIONS— LIABILITY FOR TAXES

**QUESTION:** Where a foreign corporation, through its agencies in this state, receives and sends to its home office in another state, for acceptance or rejection, applications for loans; and for the sale of promissory notes and deferred payment contracts for the purchase of automobiles—are the evidences of such loans and the promissory notes and deferred payment contracts purchased subject to taxation as intangibles in this state?

*To Honorable C. M. Gay, State Comptroller:*

It appears, from the file attached to the request for opinion, that the foreign corporation in question, through its agencies in this state, received applications for loans and for the sale of promissory notes and deferred payment contracts for the purchase of automobiles, which applications are forwarded to the home office for acceptance or rejection. When these applications are received at the home office they are considered and either rejected or accepted; if accepted, checks or drafts for the loan or in pay-



ment of the purchase price are issued. The transaction depends upon action to be taken at the home office. The closing of the contract appears to take place at the home office of the corporation in another state. After acceptance by the corporation, at its home office, the promissory notes evidencing loans made, and the promissory notes and deferred payment contracts purchased, are held by the company at its home office in another state.

Under section 192.01, Florida Statutes, 1941, all "personal property in this state, and all personal property belonging to persons residing in this state" is subject to taxation by this state. This statute, as well as chapter 199, Florida Statutes, 1941, has reference to all taxable intangible personal property having its situs for taxation in this state (*Wood v. Ford*, 148 Fla. 66, 3 So. 2d. 490; *Starkey v. Carson*, 138 Fla. 311, 189 So. 385), which may include a business situs in this state although owned by nonresidents (5 Words and Phrases, 1046-1048). Where a nonresident carries on a business in this state, more or less permanent in its nature, the property used in that business, including intangibles arising from such business, may become localized at the place where the business is conducted so as to be subject to taxation there. (5 Words and Phrases, 1046-1048). In the instant case the possession and control of the intangibles in question appear to be located in another state and not in this state, although purchased in this state. The method of making loans, and purchasing notes and contracts, used in this case is similar to that used in *Gulley v. C. I. T. Corporation*, 168 Miss. 268, 150 So. 367, in which case it was held that the intangibles in question acquired no business situs in Mississippi.

I am, therefore, of the opinion—presuming the facts to be correct as set out in the files furnished us with the request for opinion—that the property in question has no taxable situs in this state. The question should be answered in the negative.

December 9, 1947.—047-408.

#### DIVORCED WOMEN—TAX EXEMPTION FOR WIDOWS

QUESTION: Are divorced women entitled to the tax exemption provided to widows by section 9, article IX, of the Florida Constitution?

*To Honorable Millard F. Caldwell, Governor:*

Section 9, article IX, of the Florida Constitution, and section 192.06 (7), Florida Statutes, 1941, provide in part that "there shall be exempt from taxation property to the value of five hundred dollars to every widow." The question in effect is "are divorced women widows within the purview of the said provisions of law?" A similar provision has been in the constitution since its adoption in 1885, the 1940 amendment having deleted a requirement that such widow have "a family dependent upon her for support." Former attorneys general have construed this exemption as applying to women whose husbands have died and not divorced women (1927-1928 Biennial Report 679; 1931-1932 Biennial Report 459).

The ordinary meaning of the word "widow" is a woman who has lost her husband by death, and has no application to a divorced woman (45 Words and Phrases 138-146). The Supreme Court of Montana, in *O'Malley v. O'Malley*, 46 Mont. 549, 129 P. 501, Ann. Cas. 1914 B 662, said that "the word 'widow' is as old as the language itself. Colloquially as well as among the learned, in courts as well as out of them, it has always meant 'a woman who has lost her husband by death' and never, outside of slang and then only with semicontemptuous prefix, has it had any application to divorced persons." *Black's Law Dictionary*, page 856, states that the term "grass widow" is a slang term applied to a woman living apart from her husband.

Tax exemptions, whether stated in the constitution or the statutes, should be strictly construed against the claimant and in favor of the taxing power in cases of doubt (*Steuart v. State*, 119 Fla. 117, 161 So. 378). In the light of the aforementioned authorities, although the word "widow" is

sometimes defined as including women who have been divorced from their husbands (see Webster's Dictionary), it appears that the construction placed upon the above mentioned constitutional and statutory provisions granting exemptions to "widows," by former attorneys general was correct and should be adhered to. The foregoing question must be answered in the negative.

March 3, 1947.—047-71.

#### VETERAN—DISABILITY—DEFINITION

**QUESTION:** Is an ex-serviceman who, after twenty-four years' service in the regular army, was discharged from the said army, about October 26, 1941, because of a permanent incapacity, which "originated on or about July 15, 1941," and was caused by "arteriosclerosis, generalized, moderate, and arterial hypertension, severe," entitled to tax exemption under section 9, article IX, of the Florida Constitution and section 192.06 or 192.11, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

In the copy (not duly certified) of the report of physical examination, enclosed with request for opinion, made at Billings General Hospital, Fort Benjamin Harrison, Indiana, on October 26, 1941, it appears that Lt. Col. Claire E. Hutchin, now a resident of this state, was retired from active service in the regular army because of "arteriosclerosis, generalized, moderate, and arterial hypertension, severe" after about twenty-four years' service. There is indication in the said report that this condition may have developed "over a period of about 15 years."

Section 9, article IX, of the Florida Constitution, provided that "there shall be exempt from taxation property to the value of five hundred dollars . . . to every person who is a bona fide resident of the state, and has lost a limb or been disabled in war or by misfortune." To the same effect, see also section 192.06 (7), Florida Statutes, 1941.

Section 192.11, Florida Statutes, 1941, provides that "any ex-service man, a bona fide resident of the State of Florida, who has been disabled in war, or by misfortune, shall be entitled to the exemption from taxation provided for in section 9, article IX, of the Constitution of Florida . . ."

Tax exemptions, whether stated in the state constitution or in a statute, are construed against the tax exemption claimant and in favor of the taxing power. (*Steuart v. State*, 119 Fla. 117, 161 So. 378; *State v. Doss*, 146 Fla. 752, 2 So. 2d. 305.) In construing a statute, general and specific words are associated with and take color from each other (*Ex. Parte Amos*, 95 Fla. 5, 112 So. 289). Specific words followed by more general words, in a statute, limit the general words. (*Ex. Parte Amos*, supra; *Children's Bootery v. Sutker*, 91 Fla. 60, 107 So. 343; *Goldsmith v. Orange Belt Securities Company*, 115 Fla. 683, 156 So. 3; *Dunham v. State*, 140 Fla. 754, 192 So. 324.) The language of the constitutional and statutory provisions in question provides exemptions to every person who "has lost a limb or been disabled in war or by misfortune." We have three classes of disabilities, loss of limb, disability because of war and disability because of misfortune. When we apply the foregoing rules of statutory construction, it would seem that the disability by reason of misfortune should be of the same type as that caused by the loss of a limb or that usually incurred in war.

Misfortune has been defined as any instance of adverse fortune, an unlucky accident, a calamity, a mishap, or a mischance (*Ennis v. Fourth Street Building Association*, 102 Iowa 520, 71 N. W. 426); as analogous to misadventure (*Mead v. State*, Okla. Crim. App. 83 P. 2d. 404); as ill luck, ill fortune, calamity, evil or cross accident (*Anthony v. Kerbach*, 64 Neb. 509, 90 N. W. 243); as some adverse event not immediately dependent on action or will of him who suffers from it, and so improbable that no prudent man will take it into his calculations (*Re. Montouri's Will*, 40 N. Y.

S. 2d. 414); as a miscarriage of fortune (*Swetland v. Swetland*, N. J. 134 A. 822). One may be fortunate or unfortunate; if the latter, he suffers a misfortune (*Swetland v. Swetland*, supra).

The disability originated on or about July 15, 1941, and was therefore one originating when there was no state of war between this country and any other nation or country. There is no indication that the disability was incurred in any theatre of war between other countries. There is no indication of loss of limb. There is no indication that the person claiming the exemption "has lost a limb or been disabled in war." That leaves only the question as to whether one disabled because of "arteriosclerosis, generalized, moderate, and arterial hypertension, severe" is one disabled by misfortune within the foregoing statute. Is this disability of the same type as those usually caused by the loss of a limb or that incurred in war?

When we consider the foregoing definitions of "misfortune" with the foregoing rules of statutory construction, I do not think that the disability in question is one within the constitutional and statutory provisions. The disability is not the same type as that incurred by the loss of a limb or that usually incurred in a theatre of war. The question should be answered in the negative.

July 28, 1947.—047-225.

#### NAVIGABLE WATERS—LANDS UNDERLYING—LIABILITY

QUESTION: Are the lands in Section 21, Township 2 North, Range 1 East, underlying the waters of Lake McBride, subject to real estate taxes?

*To Honorable W. A. Bass, Tax Assessor:*

By reference to the government township plat, and to maps and plats of Leon county, Florida, it appears that Lake McBride is a small body of water in the northern part of township two north, range one east, having an area of twenty-five or more acres. The field notes of the government survey of this township are not available in the land office, of either the United States or the State of Florida; they appear to have been lost. The township plat shows no meandering of this body of water, which is without name on the plat. The notations on the plat indicate that the section was of usual size and contained 640.75 acres of land, more or less; and the tract book, in the state land office, reflects United States patents to the entire area aforementioned, including the lands underlying the lake, between September 22, 1825, and February 7, 1831. These patents were to individuals. The body of water appears to have been treated as nonnavigable by the government surveyor and the land department of the United States. I have been furnished with no evidence indicating that the lake was navigable in fact (see 45 C. J. 404, et seq., sections 3 et seq.), when the survey was made.

From the foregoing facts it appears that the title to the lands underlying the lake are privately and not publicly owned; this being true the question of the lake's being navigable or nonnavigable becomes immaterial, as "lands privately owned are subject to state taxation although lying under navigable waters" (*Susquehanna Power Company v. State Tax Commission of Maryland*, 283 U. S. 291, 51 S. Ct. 434, 75 L. Ed. 1042). The question should be answered in the affirmative.

May 12, 1948.—048-178.

#### RIPARIAN LANDS—DISAPPEARANCE BY EROSION

QUESTIONS: 1. May lands shown upon a subdivision plat as high lands bordering upon the ocean, which are now wholly or in part, by reason of the action of the ocean, below normal high tide, be assessed for real property taxes or taken into consideration in fixing the value for purposes of taxation?

2. May parts of lots, shown upon a subdivision plat as high lands not bordering upon the ocean, which, by reason of the action of the ocean, are now below normal high tide, be considered in fixing the value of such real property for taxation?

*To Honorable C. M. Gay, State Comptroller:*

From the maps, plats, pictures, and other evidence furnished the office in connection with the request for opinion, it appears that the lands in question were subdivided about the year 1924 into several blocks of lots. The subdivision bordered upon the shore of the ocean. During the period of time between 1924 and the present time, many of the lots in question, including some entire blocks, have been entirely eroded away by the action of the ocean, while other lots and blocks have been eroded away in part. The process of erosion has cut back into the mainland at places a distance of several hundred feet. Many lots that did not border upon the shore line when platted now border thereon.

Dominion to the shore and lands under the ocean seems to be vested either the federal government (*United States v. California*, 332 U. S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889), or in the state (*White v. Hughes*, 139 Fla. 54, 190 So. 466; *Trumbull v. McIntosh*, 103 Fla. 708, 138 So. 34; *Panama Ice and Fish Company v. Atlanta and St. Andrews Bay Railway Company*, 71 Fla. 419, 71 So. 608), and therefore such property is not subject to taxation, unless legally granted by statute or otherwise to some taxable person or corporation.

"Where a riparian tract completely disappears by erosion so that an adjoining nonriparian tract becomes adjacent to the water, the latter tract becomes riparian as if it had originally been such, and the new tract, having become riparian, may have riparian rights." (45 C. J. 533, section 203). "The riparian Acts of 1855 and 1921 apply only to 'any navigable stream, bay of the sea or harbor.'" (*Martin v. Bush*, 93 Fla. 535, 112 So. 274, text 287).

Thus, it is doubtful that section 271.01, et seq., Florida Statutes, 1941, has any application to the lands in question.

Where the ocean gradually and imperceptibly encroaches upon the land, the riparian owner loses and the state acquires title to the lands so submerged (45 C. J. 558, section 246).

From the foregoing observations, it seems that lands below normal high tide of the ocean are property of the government or state and not subject to taxation, so that the first question must be answered in the negative. The second question should also be answered in the negative. Where any of the lands are reformed by reason of accretion such lands become again subject to taxation.

I shall not, in this opinion, attempt to consider the troublesome question of ownership of lands reformed by accretion where they have at one time been completely under the sea by reason of erosion; however, reference is made to 56 Am. Jur. 903, section 493, where this question is considered.

March 27, 1947.—047-87.

#### ERRONEOUS LAND DESCRIPTION—CORRECTION

QUESTIONS: 1. Where a parcel of real property was assessed, advertised and sold under an erroneous description; which tax sale is more than two years old, may the taxing officials of the county correct such erroneous description under section 192.21, Florida Statutes, 1941?

2. If the foregoing question is answered in the affirmative, should the property in question be readvertised and sold and new tax sale certificate issued under the correct description?



*To Honorable C. M. Gay, State Comptroller:*

From the file in this case it appears that the property in question was described, on the tax rolls and subsequent proceedings, as "Gov. Lots 5 & 6 (Less S. 1000') Section 35-44-43" and "Gov. Lot 3 (Less S. 400.64') Section 35-44-43 containing 1 ac" when the descriptions should have been "Gov. Lots 5 & 6 (Less S. 1000') Section 34-44-43" and "Gov. Lot 3 (Less S. 400.64') Section 35-44-43, containing ten acres." The errors in question appear to have been the use of the number "35" instead of "34" in the first description and the designation of the area in the second description as one acre instead of ten acres.

Under section 192.21, Florida Statutes, 1941, the tax assessor has a continuing duty to prepare a legal tax roll, and where through oversight, mistake or inadvertance, he fails to do this, it becomes his duty to forthwith make the necessary changes and amendments on the roll. The statute also, in effect, makes it the duty of the officer having the custody of the tax roll to permit the correction of the same by the tax assessor at any time. (*State v. Lummus*, 111 Fla. 746, 149 So. 650, text 651; *City of Fort Myers v. Heitman*, 149 Fla. 203, 5 So. 2d. 410, text 412.)

The application for tax deed and the sale pursuant thereto, or the proceeding in equity, is the process by which the owner is divested of title, (*State v. Lummus*, supra). Where the tax records are corrected after application for tax deed or the bringing of a proceeding in equity, it would seem that new notices should be given the owner of such application or proceeding. (*State v. Lummus*, supra.) Even the failure to sell a parcel of land for delinquent taxes at a tax sale and the failure to issue a tax certificate does not affect the lien of the tax, which is fixed by statute, and the said lien may be redeemed notwithstanding the absence of a certificate. (*State v. Gay*, 133 Fla. 826, 183 So. 463.)

The lien for taxes against all taxable property in this state is fixed as of January first of the tax year and the provisions of the statutes for assessment and sale are designed simply to set up an orderly way for determining and making a record of the amount of taxes due. (*State v. Lummus*, supra.)

In the light of the foregoing authorities, it seems that errors of the tax assessor, as well as those of all other taxing officials, may be corrected by such officers at any time. This being true, the first question should be answered in the affirmative and the second question in the negative; provided, however, that before tax deed is issued or suit in equity is entered for the foreclosure of the tax lien, notice should be given the owner of the property subsequent to the making of the correction.

June 28, 1947.—047-186.

#### FORECLOSURE OF TAX LIENS—EFFECT ON OTHER TAXES

QUESTION: Volusia county has foreclosed tax liens as provided by chapter 22079, Laws of Florida, 1943. What is the effect of said decree on municipal taxes or individually held state and county taxes?

*To Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:*

I assume that the bill of complaint has been properly brought under said chapter and that the municipality and the individuals were properly made parties defendant to the said suit. If my assumptions are correct, I think the questions are answered by the Supreme Court of Florida, in the cases of *Pinellas county v. Banks*, 19 So. 2d 1, and *City of St. Petersburg vs. Certain Lands*, 28 So. 2d 537.

In the case of Pinellas County vs. Banks, 194 So. 2nd 1, the court said:

"An individual holder of state and county tax sale certificates more than two years old may pay all subsequent county taxes and bring suit to foreclose any time prior to date upon which state and county tax sale certificates held by clerk of circuit court become two years old and title to property vests in county or he may acquire certificates upon which county predicates its suit to foreclose if he prefers and delay its foreclosure further.

"Where individual holder of tax sale certificates does not elect to foreclose his certificates prior to date when property vests in county by reason of state and county tax sale certificates held by clerk of circuit court or does not acquire certificates held by clerk, individual holder becomes a defendant in county's suit to foreclose tax sale certificates and will be relegated to right to participate ratably with other lien holders in proceeds of sale by board of county commissioners."

In the case of City of St. Petersburg vs. Certain Lands, 28 So. 2d 537, the court, in effect, held that the county of Pinellas—having filed a bill of complaint in 1944 under the provisions of chapter 22079, Laws of 1943, against the City of St. Petersburg, for which the city had notice, but did not appear and contest the suit—by a decree obtained the title to the lands involved in the suit for itself and as Trustee for the City of St. Petersburg. As trustee, the county should perform the duties imposed upon it by said chapter 22079, acts of 1943, "particularly as to the distribution of plaintiff's (City of St. Petersburg's) ratable share of all proceeds which shall come into its hands from the sale of the land involved in said suit."

October 13, 1947.—047-344.

PRIVATE PERSON HOLDING TAX CERTIFICATE—  
REIMBURSEMENT FOR TAXES

QUESTIONS: Chapter 23832, Laws of Florida, 1947, directs the clerks of the circuit courts of Florida to cancel all state and county and municipal tax sale certificates held by any private person or holder upon lands which have heretofore reverted to the State of Florida under the Murphy Act. An individual holds some of these certificates:

1. Is such an individual entitled to be reimbursed for said certificates when same are cancelled?

2. The Internal Improvement Fund is the owner of certain lands in this county; there are tax sale certificates issued against said land since 1940, and while the Internal Improvement Fund was the owner thereof, some of these tax sale certificates are owned by the county and some by individuals. Can the individual be reimbursed, and if so, by whom, and can the county be reimbursed, and if so, by whom?

*To Honorable F. A. Parker, Clerk of Circuit Court, Taylor County, Perry, Florida:*

I do not pass upon the constitutionality of said chapter 23832, Laws of Florida, 1947.

Answering the first question, I do not find anything in said chapter 23832 authorizing reimbursement to individuals holding tax sale certificates issued prior to 1940 on said Murphy lands.

I do not answer the second question for it raises several legal questions which I think would be more properly answered by the court. My opinion thereon would be of little service to you.

June 25, 1948.—048-240.

#### FOREIGN VESSELS—AD VALOREM TAXES

**QUESTION:** May certain vessels be assessed for ad valorem taxes in this state, where such vessels are owned by a nonresident corporation, are registered under a foreign flag, and are engaged in foreign commerce between a port in this state and foreign ports?

*To Honorable C. M. Gay, State Comptroller:*

These vessels appear to be engaged in ferrying freight cars to and from a foreign country, one of them being in port in this state almost continuously; as soon as one goes out of port, another comes in. These vessels are not subjected to taxation in the home state of their owner.

As a general rule, vessels engaged in foreign commerce, with no established situs, may be assessed for taxation purposes at the home port, at the domicile of the owner, or where located when put to such use as to impress them with a local character (*Arundel Corporation v. Sproul*, 136 Fla. 167, 186 So. 679, text 681). It appears that none of the vessels in question have remained wholly within the State of Florida for any extended time, although some one of the vessels in question appears to be in port in this state substantially at all times. They seem to sail from and to the ports of this state, as the necessities of the business or commerce engaged in may demand. There is nothing in the request for opinion, or in the file submitted therewith, to indicate that any of the vessels in question have been connected exclusively with trade or commerce in this state, so as to make them subject to taxation in this state (see *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 19 So. 640). None of the vessels in question appear to have been used to such an extent as to impress them with a local character. Each of the vessels must be treated as a separate piece of property.

The foregoing question should be answered in the negative, unless the tax assessor should find that one or more of the vessels in question have been connected exclusively with trade or commerce in this state, and has remained in this state for such a length of time as to have acquired a local character.

February 10, 1948.—048-57.

#### STATE LAND—TAXATION BY COUNTIES

**QUESTION:** Are the lands owned by the State of Florida in Bradford and Union counties in connection with the state prison farm subject to real estate taxes assessed by such counties or either of them?

*To Honorable J. E. Straughn, Secretary, Board of Commissioners of State Institutions:*

Section 192.10, Florida Statutes, 1941, derived from Laws of Florida, 1917, chapter 7402, provides in effect that the Board of Commissioners of State Institutions, annually, before the first day of March, shall list all lands owned or used as the state prison farm in Bradford county, Florida, excepting from such list 500 acres in a contiguous body, on which the buildings belonging to the state prison farm are now or may hereafter be located, and place the valuation on all the lands as above described, excepting the 500 acres upon which such buildings are located, upon the same basis that similar lands are valued upon the tax books of said county and forward such list and valuation of lands to the tax collector of said county. The tax assessor shall then enter the same upon the tax rolls as made by the board and the county commissioners shall not change or alter such description or valuation. The tax collector of the county, on or before the first day of April each year, shall forward to the Board of Commissioners of State Institutions a statement of the amount that would be due upon

such lands as county taxes the same as if they were owned by and assessed as the lands of individuals or other taxpayers. Upon the receipt of such statement the board shall make its requisition upon the comptroller for the amount contained in the statement of the tax collector and the comptroller shall draw his warrant for the said amount upon the state treasurer and forward the warrant to the tax collector, which warrant shall be paid by the state treasurer out of any moneys in his hands the same as any other general expenses of the state are paid.

It is unquestioned that a sovereign state has the power to subject state lands to taxation. (See 51 Am. Jur. 552, Sec. 560.)

There is no provision in the constitution of the State of Florida prohibiting the taxation of state lands. Article IX of the Florida Constitution grants to the Legislature of the State of Florida the power to create a uniform system of taxation in the State of Florida.

It will be noted from a study of the history of section 192.10 that this section was enacted in 1917; thereafter included in Revised General Statutes, 1920, Compiled General Laws, 1927, and included in Florida Statutes, 1941, as section 192.10.

Section 192.06 (1) provides:

"All property, real and personal, of the United States and of this state . . . shall be exempt from taxation."

Section 192.08 provides for the exemption of state property from taxation. Each of these sections was of course included in Florida Statutes, 1941, simultaneously with the inclusion of section 192.10 which prima facie establishes the intent of the Legislature of the State of Florida to retain each of such sections in the general laws of the state, each to remain in full force and effect until repealed and must be construed in *pari materia*.

It is apparent from a reading of the title to chapter 7402, Laws of Florida, 1917, that the purpose of the tax was to give to the county of Bradford the right of taxation on the lands purchased by the state and to be used as the state prison farm, which lands when so purchased by the state were removed from the tax rolls, thereby depriving the county of not only tax revenue but other revenue which would have accrued to the county and its citizens from the produce of such lands.

I cannot say that the purpose of the act has ceased to exist and has been fulfilled but rather that the same remains in full force and effect.

It is, therefore, my opinion that the act is mandatory; that it is a valid enactment and that the taxes when levied by Bradford and Union counties in pursuance of the description and valuation made by the Board of Commissioners of State Institutions under the provisions of section 192.10, Florida Statutes, 1941, should be paid.

On January 8, 1947, this office rendered an opinion regarding the captioned matter (047-13). Insofar as that opinion conflicts with this opinion, it is hereby retracted.

(See 047-13)

January 18, 1947.—047-13.

#### STATE LANDS—TAXATION BY COUNTIES

QUESTION: Are the lands owned by the state, in Bradford and Union counties, Florida, in connection with the state prison farm, subject to real estate taxes assessed by said counties, or either of them?

*To the Board of Commissioners of State Institutions:*

This question is raised because of the existence of section 192.10, Florida Statutes, 1941 (which was first enacted as a part of the laws of this state by chapter 7402, Laws of Florida, acts of 1917), and the effect



of sections 192.06 and 192.08, Florida Statutes, 1941, and section 2, Article IX, of the Florida Constitution thereon.

A study of the histories and contents of sections 192.06 and 192.08 reveals nothing to indicate an intent on the part of the Legislature to repeal or otherwise alter section 192.10 by implication.

By chapter 8516, Laws of Florida, acts of 1921, Union county was created so as to include certain of the lands in question. I find nothing in this act which evidences any intent to alter the provisions of the 1917 act as to the lands included in Union county.

The reasons and purposes for the enactment of section 192.10, formerly chapter 7402, are expressed in the preamble to said chapter. Conditions have so changed since 1917 that said statute may have served its purpose and become functus officio.

In providing for the payment of taxes against state-owned lands, as provided in section 192.10, the Legislature in effect takes state funds and delivers them to counties to be used for county purposes, although this may be accomplished indirectly. This raises a serious constitutional question under section 2, Article IX, of the Florida constitution.

In the light of the authorities bearing upon the question, I am inclined to think that the question posed herein should be answered in the negative; however, there is argument to be made on the other side. Because of the nature of the question and the lack of clearly applicable precedents by our supreme court, it is difficult for the attorney general to render an opinion as to the validity of the assessment in question.

Under section 192.10 payments are to be made by state warrants to be paid by the state treasurer out of state funds, which the constitution requires the governor to countersign before payment may be made (section 24, Article IV, Florida Constitution). This seems to require that the governor interpret section 2, Article IX, of the constitution, and apply the same to section 192.10 in order to determine his right to countersign warrants under said section. If found invalid, warrants should not be countersigned.

It is, therefore, suggested that the governor, who is a member of the Board of Commissioners of State Institutions, request an opinion of the justices of the supreme court as to the validity of section 192.10 under the constitution, as authorized by section 13, Article IV, of the constitution, so as to determine the question.

Should an opinion of the justices of the supreme court be requested by the governor, I shall be glad to furnish the court with a memorandum of authorities concerning the question.

(See 048-57)

November 7, 1947.—047-374.

#### MUNICIPAL PROPERTY—PROPERTY TAX-EXEMPT— MUNICIPAL USES

**QUESTION:** Is real property owned and held by a municipality, which is not being used for some public purpose, subject to tax exemption under the laws of this state?

*To Honorable W. Homer Smith, County Tax Assessor, DeLand, Florida:*

All real and personal property in this state is subject to taxation except property used "for municipal, education, literary, scientific, religious or charitable purposes" (section 1, article IX, and section 16, article XVI, of the state constitution), and property of the state and of the United States. Section 192.06, Florida Statutes, 1941, as amended, provides for the exemption from taxation of "all public property of the several . . .

cities, villages, towns . . . in this state, used or intended for public purposes." The constitution "exempts from taxation, not municipal corporations as such, but property that is held and used exclusively by them for municipal purposes." (State v. St. Johns, 143 Fla. 544; 197 So. 131, text 134; Saunders v. City of Jacksonville, 157 Fla. 240, 25 So. 2d. 648, text 650.) Under the constitution "the exemption inures to the property itself when held and used for municipal purposes." While the state constitution "intends that the governmental functions and property of municipalities shall not be taxed, the constitution does not exempt the corporate business or proprietary activities of municipalities . . . from taxation" (State v. St. Johns, supra; Lakeland v. Amos, 106 Fla. 873, 143 So. 744, text 747).

"The time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental but that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality." (State v. McDavid, 145 Fla. 605, 133 A.L.R. 360, 200 So. 2d. 100, text 102; Saunders v. Jacksonville, supra.) Section 192.06, Florida Statutes, 1941, as amended, not only exempts property used for municipal purposes but extends that exemption to property "intended to be used for municipal purposes." Under statutes and laws like the ones mentioned herein, exemption fails in the absence of evidence of use or intended use for municipal purposes (61 C.J. 421, section 456). Inasmuch as taxation of municipal property necessarily involves other taxation by the municipality to provide for the payment of the taxes laid against the municipality, there is a presumption of exemption from general taxes in the absence of a clear intent to tax such municipal property (Orange City Oil Company v. Amos, 100 Fla. 884, 130 So. 707, text 709).

As the foregoing question will not admit of positive answer, in the absence of an all-inclusive definition of a municipal purpose, I can only say that property owned by a municipality in this state is exempt from taxation, under the constitution and statutes of this state, only when used or intended to be used for some municipal purpose as defined in general terms in State v. McDavid and other cases hereinabove referred to.

April 1, 1948.—048-115.

#### TAX EXEMPTION—RELIGIOUS PURPOSES

QUESTION: Is property belonging to a unit of Jehovah's witnesses entitled to exemption from taxation under the constitution and statutes of this state?

*To Honorable C. M. Gay, State Comptroller:*

Property of a corporation "held and used exclusively for religious . . . or charitable purposes" is granted exemption from taxation by the state constitution (section 16, article XVI); however, we presume that the units in question are not corporations but associations or similar groups. Section 1, article IX, of the state constitution, authorizes tax exemption of property used for religious or charitable purposes. Section 192.06, Florida Statutes, 1941, makes effective this authorization of tax exemption to several items, including property actually used for charitable purposes (subsection 3) and "all houses of public worship and the lots on which they are situated . . . and furniture therein, every parsonage and all burying grounds. . . ." (subsection 4). There is no evidence from the request for opinion or the exhibits furnished with it which indicate that any of the property is being used for charitable purposes. If the property in question, with its furnishings, constitutes a house of public worship or a parsonage or burying ground, used by a religious organization for religious purposes, and not for profit, it would seem to be entitled to exemption under the constitution and statutes mentioned. The question of whether such property is being used as a house of public worship, parsonage or burying ground, is a question of fact to be determined in the first instance

by the tax assessor, which determination may be reviewed by the county commissioners as a Board of Equalization.

Many of the courts of this country have recognized Jehovah's witnesses as a religious sect or organization (State v. Board of Public Instruction, 139 Fla. 43, 190 So. 815; Hord v. Ft. Myers, 153 Fla. 90, 13 So. 2d. 809; West Virginia Etc., v. Burnette, 319 U. S. 624, 68 S. Ct. 1178, 147 A.L.R. 674; and many cases cited in the annotation in 110 A.L.R. 383 and supplemental annotations thereto). Consequently, this office does not feel that a different status may be assigned to them for purposes of taxation in this state. Said cases almost universally treat them as a religious organization. I, therefore, hold them to be a religious organization within the foregoing constitutional and statutory provisions.

The foregoing question must be answered in the affirmative if the property in question, including furniture and equipment, constitutes a house of public worship, a parsonage or burial ground, used in connection with religious worship. If the property is not so used it would be subject to taxation. Whether or not the property is used as a house of public worship, a parsonage or burying ground, is a question of fact to be determined in the first instance by the tax assessor. Upon the question of what constitutes public worship, the courts have been very liberal.

September 18, 1947.—047-313.

#### CHURCH BUILDING—PROFIT FOR MISSIONS—TAX EXEMPTIONS

**QUESTION:** Is that portion of the Rogers building in Jacksonville, Florida (which is owned and operated by the Florida Baptist Convention, a corporation), used for commercial purposes, entitled to exemption from taxation?

*To Honorable C. M. Gay, State Comptroller:*

I have ascertained that the building in question is held in the name of the Florida Baptist Convention, a Florida corporation created by chapter 4854, Laws of Florida, acts of 1899.

The duty to make assessments and to ascertain facts to determine whether property is entitled to tax exemption or not is vested in the tax assessor, subject to revision by the Board of Equalization (see Root v. Wood, 155 Fla. 613, 21 So. 2d 133). The tax assessor has already ascertained that 45% of the assessed value of the building is entitled to exemption under the constitution and laws of this state, leaving in issue only the question of the right of the remaining 55% to exemption. I am accepting the determination by the tax assessor that 55% of the building is used for commercial purposes and 45% for religious and church missionary and similar purposes.

The executive secretary-treasurer of the Florida Baptist Convention states that "always from the beginning, the income has been turned into mission channels, as was the plan when the building was erected." The rents, issues and profits of the building, amounting to \$5,042.27, for that period of time from October 1, 1946, to July 1, 1947, appears to have been used for church missionary work.

Exemption of property used for municipal, educational, literary, scientific, religious and charitable purposes are authorized under section 1, article IX, of the state constitution, and granted to certain corporations under section 16, article XVI, of the state constitution. Legislative action is required to make effective the exemption authorized under said section 1, article IX, while said section 16, article XVI, is by its terms self-executing. (See Lummus v. Miami Beach Congregational Church, 142 Fla. 657, 195 So. 607, text 608.)

The Legislature, pursuant to said section 1, article IX, by subsection (3) of section 192.06, Florida Statutes, 1941, as amended, provided tax



exemption for "property of education, literary, benevolent, fraternal, charitable and scientific institutions" when used for such purposes, permitting the rental of not more than 75% of the floor space if the rents, issues and profits were used for such purposes. This subsection makes no mention of property used for religious purposes; this would seem to exclude such property from the operation of this subsection. Subsection (4) of said section 192.06 provides exemption for "all houses of public worship, and lots upon which they are situated . . . every parsonage, and all burying grounds . . . but any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as other property." Under this subsection the exemption obtains only to the house of worship, the parsonage and the burying ground. The Rogers Building is not within this exemption. (See *Lummus v. Miami Beach Congregational Church*, supra.) If exemption is to be allowed it must be under either section 16, article XVI, of the state constitution or subsection (3) of section 192.06, Florida Statutes, 1941, as amended.

It is admitted that the fourth and fifth floors of the Rogers building are rented out to various commercial firms. However, it appears that the rents, issues and profits received are used for missionary and other church purposes. A study of the cases of *State v. Doss*, 146 Fla. 752, 2 So. 2d. 303, text 304; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79; *Amos v. Jacksonville Realty Company*, 77 Fla. 403, 81 So. 524; and *Rast v. Hulvy*, 77 Fla. 74, 80 So. 750, leads to the conclusion that the Rogers building is not used exclusively for religious purposes within the purview of section 16, article XVI, of the state constitution.

If exemption is to be allowed under section 1, article IX, of the constitution, as made effective by subsection (3) of section 192.06, Florida Statutes, 1941, as amended, the property and the rents, issues and profits therefrom must be used for some educational, literary, benevolent, fraternal, charitable or scientific purpose; religious purposes not being within the purview of said subsection. The rents, issues and profits from the building, between October 1, 1946, and July 1, 1947, were used for missionary work and as quoted, supra, "always from the beginning, the income has been turned into mission channels, as was the plan when the building was erected."

A number of courts have held that missionary societies, temperance unions, camp-meeting associations and similar organizations are within the statutory exemption from taxation granted to charitable institutions. (Annotations in 34 A. L. R. 653, 62 A. L. R. 333 and 108 A. L. R. 291.) Annotations for charitable purposes have been held to include gifts for the erection, maintenance and repair of churches (11 C. J. 323, Section 28); aid to ministers (11 C. J. 323, section 29); missionary purposes (11 C. J. 324, section 30); Sunday school purposes (11 C. J. 324, section 31); circulation of religious literature (11 C. J. 324, section 32); and other like and similar purposes (14 C. J. S. 449-453, sections 18 and 19).

If the building itself and the rents, issues and profits received from its operation are used for charitable purposes, as defined herein, I am of the opinion that it is entitled to exemption from taxation under section 1, article IX, of the state constitution and subsection (3) of section 192.06, Florida Statutes, 1941, as amended. The tax assessor should make an investigation of fact to determine whether the foregoing facts upon which this opinion is based are correct.

December 30, 1947.—047-439.

#### PROPERTY TAX EXEMPTION—SALVATION ARMY PROPERTY— USE OF PROPERTY

QUESTION: Is property owned by the Salvation Army, and used solely as a residence for some of its officers and personnel, entitled to exemption from ad valorem taxes under the laws of this state?



*To Honorable C. M. Gay, State Comptroller:*

It appears from the corporate records in the office of the secretary of state of this state that the Salvation Army operating in this state is a non-profit corporation organized and existing under the laws of the State of Georgia and duly qualified to do business in this state. A copy of its charter was filed in the office of the secretary of state of this state in 1928.

"The Salvation Army is a benevolent and religious institution. It is likewise a church on wheels. . . . It is a church, a sect, and a religious institution." (See *Bennett v. La Grange*, 153 Ga. 428, 112 S. E. 482, 22 A. L. R. 1312, text 1316 and 1317.) The Salvation Army "is a charitable corporation in accordance with definitions so often repeated in cases." (*Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (MS) 1144, text 1146.) It is common knowledge that the Salvation Army, as well as the YMCA and YWCA and others, are benevolent, religious and educational institutions, but even so, the properties of such institutions are not exempt from taxation merely because of the stated or corporate purpose of such organizations. Exemption depends upon the use of the property as well as the general purpose for which intended. (*Salvation Army v. Hoehn*, 354 Mo. 107, 188 S. W. 2d. 826, text 828.)

To entitle property to tax exemption, under section 1, article IX, and section 16, article XVI, of the Florida Constitution; and section 192.06, Florida Statutes, 1941, as amended, the said property must be actually held and used exclusively for some educational, literary, scientific, religious or charitable purpose. Whether or not it is so used is a question of fact to be established by competent evidence. (*Dr. William Howard Hay Foundation v. Wilcox*, 156 Fla. 704, 24 So. 2d. 237.) The fact that some person was living on the property as caretaker or that officers and employees of the religious and charitable institution occupy rooms in the building on the property, would not mitigate against its use for religious and charitable purposes if such use was actually a part of such religious and charitable purposes. (See *Rast v. Hulvey*, 77 Fla. 74, 80 So. 749, text 752.) If the occupancy is for the purpose of taking care of the property, or incidentally in connection with its use for religious and charitable purposes, the right to exemption would not be defeated by reason of such occupancy. If occupied as a home, and not in connection with, and as a part of, the use of the property for religious and charitable purposes, the property would not be used exclusively for religious and charitable purposes.

If the tax assessor finds that the property in question is used and occupied by officers and personnel of the Salvation Army in connection with, and as a part of, its religious and charitable purposes, and not merely as their home or place of abode, then the foregoing question should be answered in the affirmative, otherwise it should be answered in the negative.

September 17, 1947.—047-314.

#### MASONIC TEMPLE—PROCEEDS FOR CHARITY— EXEMPTION OF BUILDING

**QUESTION:** Is the portion of the Masonic Temple building, located at 221 Main Street, in Jacksonville, Florida, (which is owned and operated by the Grand Lodge of Masons in Florida) used for commercial purposes, entitled to exemption from taxation?

*To Honorable C. M. Gay, State Comptroller:*

In addition to the information contained in the request for opinion, I have made an independent investigation of the matter, and in this connection interviewed certain officers and members of masonic lodges in this state, who furnished information not contained in the aforementioned request for opinion.

The duty to make tax assessments and to ascertain facts to determine whether property is entitled to tax exemption or not is vested in the tax

assessor, subject to revision by the Board of Equalization. (See Root v. Wood, 155 Fla. 613, 21 So. 2d. 133.) The tax assessor has already ascertained that 29% of the assessed value of the building is exempt from taxation under the constitution and laws of this state, leaving in issue only the question of the right of the remaining 71% to exemption. We are accepting the tax assessor's determination that 71% of the building is used for commercial purposes and 29% for lodge and other fraternal purposes. There being less than 75% of the building rented for commercial purposes this brings it within the purview of subsection (3) of section 192.06, Florida Statutes, 1941, as amended, if the "rents, issues and profits" of the building are used for the purposes mentioned in the said statute.

The phrase "rents, issues and profits" usually applies to net profits (54 C. J. 385, section 6, note 70), or profits which remain after maintaining the property by needed repairs, protective insurance and the payment of public charges (Hopkins v. Remy, 63 N. J. E. 12, 53 Atl. 676). See also annotations in 50 L. R. A. (NS) 1197, 34 A. L. R. 634, 62 A. L. R. 328 and 108 A. L. R. 284, as to exemptions of property used for charitable and other purposes.

About 1929 the building was encumbered by mortgage given to secure the payment of about \$200,000.00 in bonds, the proceeds of which were used to finance the purchase of the Masonic home for aged and disabled Masons, which is located at St. Petersburg, Florida. I am informed by the chairman of the grand lodge properties committee that, from 1929 to 1943, substantially all rents, issues and profits from the building were used to reduce and pay off the above mortgage indebtedness. Since 1943 the income of the building has been accumulated to create a fund to make necessary repairs brought on by the failure to make any substantial repairs between 1929 and 1943. The making of such necessary repairs has been delayed since 1943 by conditions created by the late war and conditions following it. From information furnished, it appears to be the intention of the grand lodge, as owner of the building, to use all surplus rents, issues and profits received from its operation, in maintaining the Masonic home for aged and disabled Masons and for similar charitable purposes and that all such surplus rents, issues and profits have been so used in the past. If the foregoing facts are true, any rents, issues and profits derived from the operation of the building have in the past, and will in the future be used for charitable and similar purposes; the portion of the building rented for commercial purposes would appear entitled to exemption.

The case of Simpson v. Bohon, et al.,—Fla.—, 31 So. 2d. Adv. 406, involved the Elks club building in Jacksonville, Florida. The facts in this case indicate that 43.1% of the building was rented for commercial purposes and 56.9% for fraternal and lodge purposes. By stipulation filed in the case it appeared that for a certain portion of time more than \$85,000.00 in rentals was collected, which sum was distributed as follows: over \$25,000.00 for building and operating expenses, over \$43,000.00 to reduce mortgage indebtedness of the building and approximately \$11,000.00 in payment of prior taxes encumbering the property. The remainder was invested in federal bonds. Concerning these payments the court said, "The stern fact is that not one dollar of this huge sum found its way into the charity fund. There is a vast and obvious difference in collecting money and paying it out in charities and that of creating a capital estate." In this case it was clear that none of the rents, issues and profits of the building were used for educational, literary, benevolent, fraternal or charitable purposes. All of the surplus rents, issues and profits on the Masonic Temple building, since 1929, appears to have found its way into the charity fund of the lodge. I do not think that moneys accumulated for necessary repairs should be considered as a capital estate, unless they greatly exceed the amount reasonably necessary for such reports.

I am of the opinion that the Masonic Temple building in Jacksonville, Florida, is exempt from taxation if the above facts furnished me from several sources are true and correct. Under the statutes and constitution

the duty of ascertaining facts relating to the question of tax exemption is placed upon the tax assessor; however, his determination of the matter may be reviewed by the county commissioners, as a Tax Equalization Board, upon proper application. Unless the tax assessor finds that the facts are not as stated in this opinion he should grant tax exemption to the said Masonic Temple building.

The question, therefore, should be answered in the affirmative; dependent, however, upon the right of the tax assessor to make whatever investigation of facts he may desire.

February 6, 1948.—048-42.

#### TAX EXEMPTION—LIGHTNER MUSEUM

QUESTION: Is the Lightner Museum of Hobbies, title to which is vested in the City of St. Augustine as trustee, under a conveyance from O. C. Lightner dated July 5, 1947, entitled to tax exemption under the laws of this state?

*To Honorable C. M. Gay, State Comptroller:*

By reference to a copy of the conveyance from O. C. Lightner to the City of St. Augustine, aforementioned, I find that the property in question was conveyed to the said city in trust "to be held, used, managed and administered, as well as all additions and accretions thereto, and all incomes, revenues and profits thereof and therefrom, forever, in the public interest and for the citizens of the City of St. Augustine." Although title is in the city, the management and control of the property is in five trustees. The property cannot be mortgaged, sold or otherwise disposed of. Although the deed of conveyance indicates that parts of the property may be rented for certain purposes and that admission fees may be charged, a reading of the entire instrument clearly indicates that only such fees may be charged as may be necessary, together with any income from rentals, to provide funds for the operation, maintenance and upkeep of the property. The fees to be charged are not for the purpose of deriving a profit from the museum, but merely for its operation and upkeep.

I am not fully advised of the intent and purpose of the said museum of hobbies. However, I assume that the intent and purpose of same is that of the ordinary museum (see definition of "museum" in Webster's Dictionary). "The expression 'educational institution,' or similar or related expressions in tax exemption statutes has been held to include art galleries, museums, public libraries." (51 Am. Jur. 596, section 620; see also Annotation in 95 A. L. R. 75; 61 C. J. 504, section 602.) "The term 'museum' would appear to express, not only collections of curiosity for the entertainment of the sight, but also such as would interest, amuse and instruct the mind." (Bostick v. Purdy, 5 Stew. & P. (Ala.) 105, text 108.)

If the museum in question is within the foregoing definition of "museum" it would seem to be an educational institution and within the purview of section 192.06, Florida Statutes, 1941, as amended, and section 1, article IX of the state constitution, so as to be entitled to tax exemption unless more than 75% of the said property is rented within the purview of said section 192.06. It might also be exempt as municipal property under subsection (2) of said section 192.06; however, that question need not be determined here.

May 30, 1947.—047-155.

#### TRUST PROPERTY—EXEMPTION—CHARITABLE ORGANIZATION

QUESTION: Dr. Joseph R. Fulk conveyed certain residence properties in Gainesville to the State Board of Education as trustee for the Cooperative Living Organization. In the trust deed it is provided that the beneficiary pay to the donor \$150.00 per month during the donor's life. Is the property exempt from taxation?

*To Mr. R. C. Beaty, Dean of Students, University of Florida,  
Gainesville, Florida:*

It appears that the taxing authorities do not consider the property exempt by reason of the fact that the beneficiaries are required to make the monthly payment to the donor of the trust property.

Under the trust agreement, the property is to be used to house members of the Cooperative Living Organization. That organization is composed of students who are unable to pay the expenses of their education, and is designed to help them make their way through college by supplying rooms at a nominal or a very low cost. It is unquestionably a benevolent or charitable organization with the means of the exemption statute (section 192.06), and the property is used exclusively for the charitable purposes of the organization.

The courts have held that property conveyed in trust for charitable use with a reservation of an annuity to the donor or other person payable from the property or its proceeds does not remove the property from exempt classification. (See *State vs. Watkins*, (Minn.), 121 N. W. 390; *Board of Commissioners of Tulsa Co. vs. Sand Springs Home*, (Okla.), 92 Pac. 2d. 376; *Ellworth College vs. Emmet Co.*, (Ia.), 135 N. W. 594.)

It is my opinion that the property in question is exempt from taxation.

April 21, 1948.—048-133.

#### PRIVATE EDUCATIONAL INSTITUTIONS—TAX EXEMPTION

QUESTIONS: 1. Under what circumstances is a private educational institution entitled to exemption from taxation, under section 1, article IX, of the state constitution, and section 192.06, Florida Statutes, 1941?

2. Who is the judge of the facts and circumstances which determine when, and under what circumstances, such a school is entitled to tax exemption?

*To Honorable C. M. Gay, State Comptroller:*

Section 192.06, Florida Statutes, 1941, provides exemption from taxation of "such property of educational . . . institutions within this state as shall be actually occupied and used by them for the purposes for which they have been or may be organized; provided, not more than seventy-five per cent of the floor space of said building or property is rented and the rents, issues and profits of said property are used for the educational . . . purposes of said institutions." This statute exists pursuant to section 1, article IX, of the state constitution, which provides for taxation of all taxable property in this state except "such property as may be exempted by law for municipal, education, literary, scientific, religious and charitable purposes."

To be entitled to exemption from taxation, as provided by the constitution and statute, the property must be actually held and used for the purposes of education. Whether or not it is so owned, occupied and used, is a question of fact to be determined by the county taxing officials who, in determining the status of property of that kind, should exercise a reasonable discretion so as not to put the owner to the expense of a lawsuit where the property is being used in good faith for educational purposes. (*Dr. William Howard Hay Foundation v. Wilcox*, —Fla.—, 24 So. 2d, 237.)

Statutes and constitutional provisions, like the foregoing, do not contemplate that such property be "held, occupied or used for profit of any nature or extent, except that which may be incidental to the occupancy and use for educational purposes." (*Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, text 238.) However, it was never contemplated that such institutions be operated with no source of revenue, and certainly it is contemplated that they may charge and collect tuition from those who are able to pay for the privileges offered. It is also contemplated that those



employed in the enterprise may earn a livelihood. The earning of a livelihood, or even an incidental surplus, is not sufficient to effect a change in the purposes of the institution, so as to change it from an educational institution to one operated strictly for profit. (*Lumms v. Florida Adirondack School*, supra.) Reference is made to the statement of facts, in the last mentioned case, supra, appearing in 168 Southern Reporter on page 238. The right to exemption is determined by the use to which property is put and not by the character of the owner. (*State v. Doss*, 150 Fla. 486, 8 So. 2d, 15, text 16.) In the foregoing case the property was held by trustees.

I have set out in the foregoing observations the usual general rules for determining when property used for educational purposes is entitled to exemption from taxation. This seems to answer the first question.

In answer to the second question, it is the duty of the tax assessor to ascertain from available evidence and from personal observations whether or not any property claimed to be exempt, because used for educational purposes, is actually and primarily used for such purpose and not commercially. This is a question of fact to be determined by him and cannot be exercised by either the state comptroller or the attorney general or by any other person. However, the tax assessor's determination may be reviewed by the county commissioners as a Board of Equalization, and upon proper proceedings by the courts.

Whether or not the Ann Lisbeth Seese Private School, in Orange county, Florida, is exempt, is a question of fact to be determined by the tax assessor of Orange county, Florida, in the light of the foregoing legal observations, subject to review by the County Board of Tax Equalization.

October 14, 1947.—047-336.

#### OIL WELL EQUIPMENT—EXEMPTION OF WELL EQUIPMENT

QUESTION: Is the machinery constituting the gathering system of oil and gas wells in this state exempt from ad valorem taxes upon personal property, under chapter 23883, Laws of Florida, acts of 1947?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 23883, Laws of Florida, acts of 1947, after providing for a severance tax for oil and gas produced in this state provides: (a) that no other excise or license taxes shall be imposed; (b) that the discovery of oil under any of the lands in this state shall not be held to increase its value for taxing purposes; (c) that the value of land shall not be held to increase in value by reason of the location thereon of oil and gas gathering or producing machinery; (d) that "no ad valorem tax shall be imposed upon such producing equipment and machinery."

The chapter, when read as a whole, insofar as it relates to taxation, appears to substitute a severance tax for all other taxes in connection with oil and gas production. Several of the courts held that the substitution of one kind of tax in lieu of other kinds is not an exemption within the limitations usually imposed by constitutional provisions regulating the power of the Legislature to exempt property from taxation (2 Cooley Taxation 4th Ed. 1396, section 668; 61 C. J. 383 and 384, section 382; 51 Am. Jur. 525 and 526, section 523; and cases cited by said authorities).

Although there is doubt as to the constitutionality of this act, it has not been the policy of the attorney general to pass upon the constitutionality of laws where there is any doubt as to their validity under the state or federal constitutions. It would seem proper for the state and county taxing officials to comply with the law in question until the foregoing question is settled by the courts. It is suggested that proceedings be brought as soon as possible to obtain a court decision on this question.

July 28, 1947.—047-230.

#### RESUBDIVISION—ASSESSMENT—ACREAGE

**QUESTION:** Where minor portions of an existing subdivision in this state are resubdivided, is such resubdivision within the purview of section 192.31, Cumulative Supplement to Florida Statutes, 1941, so as to be assessed on the same basis as unplatted acreage of similar character, until sixty per cent of such resubdivided lands shall have been sold as individual lots?

*To Honorable C. M. Gay, State Comptroller:*

Section 192.31, Cumulative Supplement to Florida Statutes, 1941, requires that the state comptroller's manual of instructions to the taxing officials "provide that platted lands unsold as lots shall be valued, for tax assessment purposes, on the same basis as any unplatted acreage of similar character, until sixty per cent of such lands included in one plat have been sold as individual lots." Sections 192.29 and 192.30, Florida Statutes, 1941, provided for the vacation of subdivisions, where all the property therein was in one ownership, and the returning of the property thereof to acreage for the purpose of taxation; however, these sections were amended by chapter 22999, Laws of Florida, acts of 1945, so as to provide for the vacation of plats "either in whole or in part." Under said sections 192.29 and 192.30, as amended, it seems that the resubdivided portions of the original subdivision might be returned to acreage when owned by one person. I am of the opinion that these laws should be read together in construing section 192.31 as mentioned. (*Watson v. Holland*, 155 Fla. 342, 20 So. 2d 388, text 393.) Statutes relating to taxation should be strictly construed (*City of Pensacola v. Lawrence*, 126 Fla. 830, 171 So. 793), favorable to the taxpayer. (*Lee v. Wood*, 126 Fla. 104, 170 So. 433.) Ambiguity in taxing statutes must be resolved in favor of the taxpayer. (*Cunningham v. Stefanidi*, 144 Fla. 214, 197 So. 722.)

When section 192.31, Cumulative Supplement to Florida Statutes, 1941, is considered in connection with laws passed at prior and subsequent sessions of the Legislature, and under the rules of construction of taxing statutes, *supra*, I am of the opinion that said section 192.31 should be construed as extending to resubdivisions as well as to the original subdivision, where the resubdivision is bona fide and not for the purpose of evading taxes. The question should be answered in the affirmative.

November 24, 1947.—047-389.

#### LEGAL OWNER—MARRIED WOMAN—EXEMPTION AS PERMANENT HOME

**QUESTION:** Is a married woman, who owns a home in Highlands county, Florida, who has lived therein by herself for the past four years, the property is recorded in her name (her husband has a business or farm in Delaware, is not a resident of Florida and never has been), entitled to homestead exemption as provided by article 10, section 7 of the Constitution of Florida, she has never registered as a voter in Florida?

*To Honorable P. G. Gearing, County Tax Assessor, Highlands County, Sebring, Florida:*

Article 10, section 7, of the Constitution of Florida reads as follows:

"Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on the said home and contiguous real property as defined in article 10, section 1, of the Constitution."

If this person has the legal title to the real property in Highlands county, resides thereon and in good faith makes the same her permanent home, she is entitled to the exemption as mentioned in said amendment.

It is the duty of the county tax assessor to determine whether or not the same is her permanent home. If it is her permanent home, she is entitled to the exemption even though her husband is living in Delaware.

August 4, 1948.—048-263.

APPLICATION HOMESTEAD EXEMPTION—DISAPPROVAL—  
COUNTY COMMISSIONERS

QUESTION: Agreeable to section 192.19, Florida Statutes, 1941, application was made to the tax assessor for homestead exemption; the tax assessor rejected said application and as required filed triplicate notices of his disapproval. Is the Board of County Commissioners required to act on said disapproval where the applicant for said exemption, fails to appear in person or by attorney, and makes no objection to said disapproval before the said board sitting as a Board of Equalization?

*To Honorable W. Homer Smith, Tax Assessor, Volusia County,  
DeLand, Florida:*

A part of section 192.19, Florida Statutes, 1941, reads as follows:

"... The original notice of disapproval of application for exemption, with entry of service upon the applicant, when filed with the clerk of the board of county commissioners shall constitute an appeal of the applicant from the decision of the tax assessor, refusing to allow the exemption for which application was made, to the board of county commissioners, when sitting as a board of equalization, the said board of county commissioners, when sitting as a board of equalization, shall review the application and evidence presented to the tax assessor upon which the applicant based his claim for exemption and shall hear the applicant in person or by agent in behalf of his right to such exemption, and the board of county commissioners shall reverse the decision of the tax assessor in said cause and grant exemption to the applicant if in its judgment the applicant is entitled thereto, or affirm the decision of the tax assessor. . ."

In my opinion the section makes it mandatory for the county commissioners to review the application and the evidence presented to the tax assessor whether the applicant appears in person or by agent before said county commissioners.

I, therefore, answer the question in the affirmative.

May 13, 1948.—048-153.

HOMESTEAD EXEMPTION—MENTALLY INCOMPETENT OWNER  
CONFINED TO INSTITUTION

QUESTION: Does the owner of real estate in this state lose his homestead tax exemption privileges thereon when he becomes mentally incompetent; is thereafter confined in an institution for treatment of such mental incompetency, and his said homestead property is rented for his benefit?

*To Honorable W. Homer Smith, Tax Assessor, Volusia County,  
DeLand, Florida:*

Article 10, section 7, of the constitution reads in part as follows:

"Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and

in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessment for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property as defined in Article 10, Section 1, of the Constitution, for the year 1939 and thereafter . . ."

The incompetent is, of course, absent involuntarily from his homestead property on a temporary basis, and for the purpose of this opinion it must be assumed that he did not and could not have abandoned his property as homestead property.

In view of these facts it is my opinion that the incompetent is entitled to said homestead tax exemption even though the property might be rented by his representative for the benefit of such incompetent. (In this connection see section 192.14, Florida Statutes, 1941.)

I assume, of course, that the incompetent has no other property which he is exempting or attempting to exempt under said section 7, article 10, of the Florida Constitution.

I, therefore, answer the question in the negative.

May 13, 1948.—048-155.

#### HOUSEBOAT—HOMESTEAD EXEMPTION

QUESTION: Can a person who owns only a houseboat and resides thereon claim exemption from taxation thereon pursuant to section 7, article X, of the constitution of Florida?

*To Honorable W. Homer Smith, Tax Assessor, Volusia County,  
DeLand, Florida:*

I assume that the houseboat in question is afloat and is not attached to any real estate owned by the said owner of the said houseboat, which real estate could be exempt from taxation.

Section 7, article X, of the constitution provides in part:

"Every person who has legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or other legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessment for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property as defined in Article 10, Section 1, of the Constitution, for the year 1939 and thereafter . . ."

Inasmuch as the said section of the constitution applies only to real property, in my opinion, it would not apply to a houseboat as mentioned in the request for opinion.

I, therefore, answer the question in the negative.

January 6, 1947.—047-21.

#### HOMESTEAD EXEMPTIONS—OCCUPANCY

QUESTION: Under the circumstances outlined below, is the owner of a home entitled to homestead exemption when he is deprived of the privilege of living in the home through no fault of his own?

The request for opinion asserts that a man purchased a home in November of 1946, with the idea of occupying it with his family. Upon notifying the tenant that he would like to have possession as soon as possible so that he could get in and settle before the winter, he was informed that



the tenant refused to vacate. The tenant told the owner that under rent control, he, (the tenant) did not have to move for six months. The purchaser of the home finds this to be correct according to the rent control.

I understand the owner wants to take out homestead exemption on the property as he does not own any other home. All rulings have said one must reside or occupy the home on or before January 1, of the year in which exemption is to be allowed.

*To Honorable Joseph L. Dunne, Assessor of Taxes, St. Johns County, St. Augustine, Florida:*

I assume that the party to whom reference is made has never been in possession of the said property.

Article X, section 7, of our constitution says:

"Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation except for assessments for special benefits up to the assessed valuation of five thousand dollars on said home . . ."

Whether property is exempted, or not exempted, under this section must be determined as of January 1 (section 192.04, Florida Statutes, 1941). The status of real estate on that day determines whether or not the exemption should be allowed.

If the purchaser of this property intended to occupy the said property as his home, the fact that he was not in possession and could not be in possession of same on January 1, because of the matters and things set forth—factual premise—would not deny him such exemption, because the sovereign aided by the act of the public enemy, impeded his intention, making actual residence impossible, in consequence of an emergency and public benefit law.

This opinion presupposes that the purchaser of the said property will duly make application for the said homestead exemption at the time and in the manner required by the statutes and, further, that the said purchaser shall during the year 1947 go into possession of said property and in good faith make the same her or his permanent home in order to be entitled to the homestead exemption for the year 1948; it being the intention of the opinion to limit the right of said purchaser to the said year 1947.

February 18, 1947.—047-60.

#### MUTUAL OWNERSHIP CORPORATION—EXEMPTION

QUESTIONS: 1. Would homestead exemption be available to World War II veterans who are owners of a home in a mutual ownership corporation the land and buildings being owned by the corporation with each family a stockholder in the nonprofit corporation?

2. Would homestead exemption be available if the structures were on land held by the nonprofit corporation under a long term lease?

3. Would homestead exemption be available to the families if the land were held by the nonprofit corporation under a lease with a provision for amortization of its cost after the completion of amortization of the structures?

*To the Housing Authority of Jacksonville, Jacksonville, Florida:*

I assume from the request for opinion and from the further explanation given me in letter of February 17, that it is contemplated that a mutual ownership corporation would be set up with the veterans who are to occupy the dwelling houses as stockholders in the corporation, which corpora-

tion is to be a nonprofit one. In other words, the veterans would be merely stockholders in a nonprofit corporation and if there be any ownership held by them in the property it would be solely because they own stock in the corporation, and not otherwise.

Article X, section 7 of the Constitution of Florida, says:

"Every person who has the legal title or beneficial title in equity to real property in this state . . ., shall be entitled to exemption from all taxation . . . up to the assessed valuation of \$5,000.00 . . . Said title may be held by the entireties, jointly or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than \$5,000.00 shall be allowed to any one person or any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person."

See also section 192.12, Florida Statutes, 1941.

Section 192.13, Florida Statutes 1941, defines the extent of homestead exemption under the said amendment to the constitution and said section reads as follows:

"Vendees in possession of real estate under bona fide contracts to purchase when such instruments under which they claim title, are recorded in the office of the clerk of the circuit court where said properties lie, and who reside thereon in good faith and make the same their permanent homes and widows residing on real estate by virtue of dower or other estates therein limited in time by deed, will, jointure, or settlement, shall be deemed to have legal or beneficial title to said property."

The mere fact that the veterans own stock in the corporation would not, in my opinion, classify them as holding the legal title or beneficial title in equity to the real property, as contemplated in said amendment and said sections.

Inasmuch as the exemption depends upon the veterans' legal or beneficial title in equity to the real property it would not matter, as far as this opinion is concerned, as to the title or interest which the corporation might have in the property whether as an outright owner as mentioned in question 1, or lessee as mentioned in question 2, or lessee as set forth in question 3.

I, therefore, answer all of the questions in the negative.

October 1, 1947.—047-325.

#### COLORED MASONIC BUILDING—BUILDING USED COMMERCIALLY—EXEMPTIONS

**QUESTION:** Is that portion of the colored Masonic Temple building, in Jacksonville, Florida (which is owned and operated by the Union Grand Lodge of Colored Masons of Florida), used for commercial purposes, entitled to exemption from taxation?

*To Honorable C. M. Gay, State Comptroller:*

Under date of September 17, 1947, this office rendered an opinion (No. 047-314), relating to the question of exemption of the Masonic Temple building, located at 221 Main Street in Jacksonville, Florida. The same rules mentioned in said opinion, as applicable to the said Masonic Temple building, are also applicable to the colored Masonic Temple building, described.

It is suggested that a copy of the opinion of September 17, relating to the Masonic Temple Building, located at 221 Main Street in Jacksonville,

be transmitted to the tax assessor of Duval county, with directions that he investigate the matter of the colored Masonic Temple and ascertain whether or not the surplus rents, issues and profits derived from the renting of the building are actually used for some "educational, literary, benevolent, fraternal or charitable purpose." If it is found that said rents, issues and profits are so used, then he should grant exemption to the said building; if it is found that they are not so used, then the portion of the building used for commercial purposes is subject to taxation.

September 12, 1947.—047-285.

#### REVENUE CERTIFICATES—PLEDGE OF FUNDS—NEED FOR VOTE

QUESTIONS: 1. Where, under chapter 24174, Laws of Florida, 1947, the County Board of Public Instruction proposes to issue "revenue certificates" based on race track revenues, further supported by transfer of county funds if the race track revenues should prove insufficient, can any property tax be pledged in support of the certificates?

2. Is the certificate submitted herewith sufficient in accordance with chapter 24174, Laws of Florida, 1947, the special act authorizing such revenue certificates?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The securities would not be "revenue certificates" because, as I understand it, the county board does not expect to obtain revenue from the projects. But be that as it may, a property tax may not be pledged for the payment of the certificates without a vote of the freeholders under section 6 of article IX of the constitution.

I have examined the proposed form of certificate submitted with inquiry. There are a few minor corrections, such as inserting the date after the words, "January and July" in the first paragraph; inserting after the words, "of each year" in the first paragraph the following: "until maturity of the principal sum." That portion of the certificate following the words, "Acts of 1947" in the third paragraph is probably meaningless and ineffective. The certificate should name specifically the funds or moneys which are pledged and should include such funds only as are authorized by chapter 24174.

No resolution was submitted with inquiry.

This opinion is not to be construed as holding that chapter 24174 is constitutional or that the proposed revenue certificates, or any other form of certificates, are valid in the absence of the approving vote of a majority of the freeholders. In this case those questions can be finally determined only by the opinion of the supreme court. While it is true that in a recent case, the supreme court appeared to hold that race track funds might be pledged to secure revenue certificates issued for the construction of county buildings under a special act of the Legislature, comment in a later case follows its earlier opinions to the effect that no county property other than revenue from the project itself may be pledged except on the approving vote of a majority of the freeholders.

In the event the county board should institute validation proceedings in the courts, it is suggested that the resolution and certificate specifically describe each fund proposed to be pledged, so that the court may pass upon each.

September 22, 1947.—047-312.

#### HISTORICAL SITE—TAX EXEMPTION OF RUINS

QUESTION: The ruins of an old Spanish mission are located near New Smyrna Beach on land, title to which is in the name of the Florida

State Historical Society. The society was formed for the purpose of obtaining title to some of the old historical sites in Florida to preserve these sites so that the people of the United States might be better educated in the early history of one of the states of the Union. These ruins are now overgrown with grass and underbrush and the Chamber of Commerce of New Smyrna is planning to clean up the weeds and grass and place a caretaker thereon, title to the property to remain in the Florida State Historical Society. If the chamber of commerce takes over the property and charges a small admission fee, which fee will be used solely as stated, can the county tax assessor, exempt the property from county ad valorem taxes?

*To Honorable W. Homer Smith, Tax Assessor, Volusia County, DeLand, Florida:*

The property so held, in my opinion, is exempt from ad valorem taxation by virtue of article IX, section 1, of the Constitution of Florida.

If the small fee to be charged, according to the statement made, is to be used exclusively for maintaining the property, it would be in order for you to exempt the same from taxation even though this small admission fee is charged, as this alone would not affect the status of the property.

### TAX ASSESSMENTS AND SALES

April 23, 1947.—047-112.

#### TAX CERTIFICATE—CANCELLATION—FEES

**QUESTION:** What compensation is allowed clerks of circuit courts in connection with the performance of their duties in cancellation of tax certificates under chapter 20981, acts of 1941 (sections 193.04 and 193.05, Florida Statutes, 1941), and by whom is such compensation payable?

*To Honorable J. A. Peacock, Clerk Circuit Court, Calhoun County, Blountstown, Florida:*

Section 193.05, Florida Statutes, 1941, being section 2 of said chapter 20981, Laws of Florida, 1941, says:

"The comptroller of the state of Florida and the clerks of the circuit courts are hereby authorized and directed to cancel and satisfy of record all such outstanding tax certificates and liens cancelled and discharged by section 193.04."

I can find no provision in the law allowing compensation to the clerks for such service and in the absence of any such law, the clerks are not entitled to any compensation therefor.

April 3, 1947.—047-105.

#### COMMISSIONS ON INTANGIBLES—COMPENSATION

**QUESTION:** In view of the provisions in the last sentence of sub-section (4) of section 193.65, 1945 Cumulative Supplement to Volume 1, Florida Statutes, 1941, and sub-section (5) of said section, are commissions on intangible personal property taxes a part of the general income or compensation of county tax assessors and tax collectors?

*To Honorable C. M. Gay, State Comptroller:*

Section 193.65, supra, specifies the commissions to which county tax assessors shall be entitled upon real and tangible personal property taxes and the commissions to which county tax collectors shall be entitled upon real and tangible personal property taxes and licenses; sub-section (4) thereof provides for the auditing and allowance of commissions for assessing the state taxes and for collecting taxes assessed for or levied by



the state and contains similar provisions with respect to the commissions assessed and collected for county taxes, special school district taxes and other district taxes and the concluding sentence of said sub-section, and the aforesaid sub-section (5) read as follows:

"... All amounts paid as compensation to any tax assessor or to any tax collector under the provisions of this or any other law shall be a part of the general income or compensation of such officer for the year in which received and nothing in this section contained shall be held or construed to affect or increase the maximum salary as now provided by law for any such officer.

"(5) Provided, that the provisions of this section shall not apply to commissions on intangible property taxes . . . ;"

Section 199.06, Florida Statutes, 1941, provides for the commissions to which county tax assessors and tax collectors shall be entitled on intangible personal property taxes, for the auditing and allowance of said commissions and also that said commissions are independent and exclusive of any commissions that may be due said officers for assessing and collecting other taxes. In addition to the commissions permissible under the last-mentioned section, county tax collectors are also allowed further fees for executing and collecting intangible personal property taxes under executions as provided by section 199.18 (3), 1945 Cumulative Supplement to Volume 1 of said statutes.

It seems to me that sub-section (5) of section 193.65 was not incorporated in said section to give the officers in question their commissions on intangible personal property taxes in addition to the compensation to which they are entitled to receive under section 145.01, Florida Statutes, 1941, providing for the compensation of county officials where they are paid wholly or partly by fees or commissions, or fees and commissions. On the contrary, when all of the foregoing statutes are considered together and in the light of the origin and history of section 193.65, it seems evident that the Legislature intended that commissions on intangible personal property taxes should be a part of the general income and compensation of county tax assessors and tax collectors, and such is my conclusion and opinion. The opinion is restricted to the general law relating to the subject of inquiry.

January 15, 1948.—048-24.

#### DRAINAGE TAXES—FEES FOR TAX COLLECTION— DRAINAGE TAXES

QUESTION: The tax collector for Palm Beach county, Florida, is entitled to what fees and commissions for collecting the drainage taxes assessed for the Shawano drainage district, formerly the Brown drainage district, in said county?

*To Honorable C. M. Gay, State Comptroller:*

The said drainage district was established by chapter 11864, Laws of Florida, acts of 1927, under section 21 of which an annual tax levy is made by the Board of Supervisors and certified to the tax collector for Palm Beach county, Florida, who is required to make collection of such taxes, for which services "the said tax collector shall retain for his services one per cent of the amount he collects on current taxes and two per cent on the amount he collects on delinquent taxes." (Sections 22-24 of the act.) These provisions appear to fix the fees and commissions of the tax collector unless changed or repealed by subsequent legislation.

Under section 1, chapter 17876, Laws of Florida, acts of 1937, it was provided that "the tax collectors of the several counties of the State of Florida shall be entitled to receive upon the taxes collected . . . the following commission on and including county, special school district and all

other tax district taxes, general or special, that are provided by law to be assessed by the tax assessors . . . and provided by law to be collected by the tax collectors" (here follows a schedule of the commissions to be paid). The taxes in question are taxes provided by law to be collected by the tax collector. The supreme court, in the case of *Crooks v. State*, 141 Fla. 597, 194 So. 237, text 241, construed the said 1937 act, insofar as it applied to tax assessors, and stated that "it appears . . . that the legislature intended by the enactment of Chapter 17876, supra, a general revision of the compensation of tax assessors of the different counties of Florida, and at the same time defined their duties and services, and in the same act clearly set forth the taxing units of the counties where they are required to render services." If the act was a general revision of the laws relating to the compensation of tax assessors it was likewise a general revision of the laws relating to the compensation of tax collectors. Said chapter 17876 was amended by chapter 20936, Laws of Florida, acts of 1941; and as amended was brought forward as section 193.65, Florida Statutes, 1941; which section was further amended by chapter 21918, Laws of Florida, acts of 1943. Said chapter 21918 amended said section 193.65 to "read as follows," so that any part of the section not brought forward by the amendment was repealed (*State v. County Commissioners*, 23 Fla. 483, 3 So. 193, text 204; 50 Am. Jur. 556-557, section 552). Section 193.65, as amended by the 1943 act, provides that "the provisions of this section shall not apply to commissioners on . . . drainage district or drainage subdistrict taxes." The effect of this provision seems to have been the deletion of drainage district taxes from the operation of said section 193.65 subsequent to the effective date of chapter 21918, acts of 1943.

Although chapter 17876, Laws of Florida, acts of 1937, standing by itself would seem to repeal the provisions in chapter 11864, Laws of Florida, acts of 1927, by implication; when said chapters are construed in the light of chapter 21918, Laws of Florida, acts of 1943, I am of the opinion that the said provisions in chapter 11864 were suspended and not repealed so that when section 193.65, Florida Statutes, 1941, was amended by the 1943 act so as to delete drainage district taxes from the operation of said section the provisions of the 1927 act were revived and became operative after said amendment. (See 59 C. J. 940, section 553; *Maresca v. United States*, 277 Fed. 727, text 737; 1 *Sutherland Statutory Construction*, 3rd Ed. 516, section 2037.)

From the foregoing matters and things it seems that the fees and commissions of the tax collector of Palm Beach County, Florida, for collecting the drainage district taxes assessed for the Shawano Drainage District should be paid pursuant to chapter 11864, Laws of Florida, acts of 1927, unless the said tax collector has brought himself within the last proviso in said section 193.65, Florida Statutes, 1941, as amended by the 1943 act, by filing with the Board of County Commissioners a declaration in writing as therein provided. (See *Attorney General v. Greenville and Hudson Railway Company*, 59 N. J. E. 372, 46 Atl. 638, text 644.)

July 15, 1948.—048-236.

#### TAX COLLECTOR'S FEES—SALE OF CERTIFICATES

QUESTION: Do the commissions provided by section 193.65, Florida Statutes, 1941, as amended, for the tax collectors of this state, apply to moneys paid such tax collectors as consideration for tax sale certificates sold by them under sections 193.51, et seq., Florida Statutes, 1941?

*To Honorable Clyde H. Simpson, County Tax Collector, Jacksonville, Florida:*

A former attorney general of this state, by an opinion dated January 30, 1933 (1933-1934 Biennial Report, page 233), held that under sections 1033 and 1034, Compiled General Laws, 1927 (amended and brought forward as section 193.65, Florida Statutes, 1941), no fees were payable to

the tax collectors upon moneys received as compensation for tax sale certificates sold by the tax collectors but that the fees provided for tax collectors under section 970, Compiled General Laws, 1927 (brought forward as section 192.52, Florida Statutes, 1941), were exclusive. This seems to amount to a departmental construction of the statute in question which has remained unchanged by the Legislature for more than fifteen years (see *State v. Bryan*, 50 Fla. 293, 39 So. 929; *Amos v. Mosely*, 74 Fla. 555, 77 So. 619; *State v. Leatherman*, 99 Fla. 899, 128 So. 21; *State v. Lee*, 123 Fla. 252, 166 So. 565; *State v. Lee*, 137 Fla. 658, 188 So. 775; *Lee v. Gulf Oil Corporation*, 148 Fla. 612, 4 So. 2d. 871), and is, therefore, persuasive and should not be disturbed unless clearly erroneous or unreasonable.

Section 193.65, Florida Statutes, 1941, as amended, provides that "the tax collectors . . . of the state shall be entitled to receive upon the amount of all real and tangible personal property taxes . . . collected and remitted, the following commissions . . ." When the tax collector sells and transfers a tax sale certificate under the statute, it does not appear that he is making a collection of the taxes due but is merely and only selling and transferring the tax lien; the taxes remain a charge or lien upon the lands described in the certificate and such lien may be redeemed by the land owner paying the taxes, together with costs, interest, etc. The compensation paid the tax collector for a tax sale certificate is for the tax certificate and lien and is not a payment and discharge of the taxes assessed.

In the light of these observations, I see no reasonable reason for overruling or changing the said opinion of January 30, 1933. The said opinion answered the foregoing question in the negative, which answer is adhered to here.

March 24, 1947.—047-78.

#### SCHOOL BOARD—PAYMENT TO ASSESSOR

QUESTION: Is the Lee County School Board required to advance money each month to the tax assessor of said county for making the tax roll of said county, or may said board wait until the tax roll is complete before advancing any money to the said tax assessor?

*To Honorable A. H. Armstrong, President, T. A. A. F., Madison, Florida:*

Section 193.65, Florida Statutes, 1941, as amended by chapter 21918, Laws of Florida, 1943, provides for the commissions of tax assessors in the several counties and says, among other things, that the commissions for assessing county taxes shall be audited and paid by the boards of county commissioners of the several counties and that the commissions for assessing all special school district taxes shall be audited by the board of public instruction of each respective county and taken out of the funds of the respective special school districts under its control, and allowed and paid to the said tax assessors for assessing such taxes, and further, that the commissions for assessing special tax district taxes shall be paid at the time and in the manner now or as may hereafter be provided for the payment of the commissions for the assessment of county taxes.

Section 193.67, Florida Statutes, 1941, states how the tax assessors of the several counties shall be paid and what amounts they shall be paid monthly for assessing taxes.

Construing these two sections, it is my opinion that the tax assessor shall be paid monthly in the manner and amount set forth in said section 193.67, by the school board, such fees as may be due for assessing special school district taxes, and the county commissioners shall pay him in the manner and in the amounts specified in said section 193.67, the fees allowed him for assessing county taxes.

June 14, 1947.—047-160.

#### SALE OF LANDS—NOTICE—RESALE

**QUESTION:** Under certain circumstances, is a clerk of the circuit court legally justified in readvertising and reselling property?

*To Honorable D. H. Sloan, Jr., Clerk of Circuit Court, Polk County, Bartow, Florida:*

As I view it, the notice of a public sale to the highest and best bidder therefor for cash has for its purpose, among other things, the giving of a fair and equal opportunity to everyone to bid on the property, and to realize as much money from the sale for the county as possible.

The circumstances outlined show that because of misinformation having been furnished one of the parties who had expressed a willingness to participate in the sale, he did not participate therein. If there is a definite assurance that at a future sale the property will bring in more money for the county, I think it would be legally justified to have the county commissioners declare the attempted sale ineffectual and readvertise and resell the property at an early date.

April 29, 1948.—048-140.

#### BIDS IDENTICAL—SALE OF LAND

**QUESTION:** There are several persons who will pay the tax, costs, charges, and no interest for the first year, for 20 acres of land to be struck off by me as tax collector pursuant to section 193.56, Florida Statutes, 1941. If these persons make identical bids as above stated, same being the best bid possible under said section, to whom shall said land be struck off?

*To Honorable R. D. Yoder, Tax Collector Glades County, Moore Haven, Florida:*

Section 193.56, Florida Statutes, 1941, reads as follows:

"The land shall be struck off to the person who will pay the tax, interest, costs and charges and will demand the lowest rate of interest for the first year, not in excess of the maximum rate allowed by law."

I know of no law allowing the acceptance of a better bid than the one set out in the question for if a better bid should be made and accepted, the bidder would, in effect, be paying a premium to the county.

If there are several bidders who are willing to pay this best bid I can only suggest that the one submitted first in point of time would be the one to be accepted.

May 21, 1948.—048-175.

#### COUNTY BUDGET COMMISSIONS—ASSESSMENT ROLL

**QUESTION:** Does section 193.29, Florida Statutes, 1941 (chapter 20722 paragraph 5; Laws of 1941, as amended by chapter 22079 paragraph 4, Laws of 1943), apply to all counties or only to those counties having budget commissions?

*To Honorable A. H. Armstrong, Chairman of Executive Committee, T. A. A. F., Madison, Florida:*

From a careful reading of this section, in my opinion, the same applies to all counties of the state whether they have or have not budget commissions. The only difference in this section between counties having budget



commissions and those not having such commissions is that in those counties having budget commissions the assessment roll must be submitted to such budget commission before the same is submitted to the comptroller or equalized.

July 15, 1948.—048-234.

#### MILLAGE REQUIREMENTS—TIME TO REPORT TO TAX ASSESSOR

**QUESTION:** Is there a time limit as to when the boards of county commissioners, and the school boards, of the several counties of this state, must furnish the tax assessor with the amount of millage to be assessed for the current tax year?

*To Honorable F. A. Hoffman, County Tax Assessor, Apalachicola, Florida:*

There is no statute expressly fixing the time within which such millage shall be determined and reported to the tax assessor, and if such a time is fixed by law it must be by implication.

Section 193.25, Florida Statutes, 1941, requires that the tax assessor complete the assessment roll "on or before the first Monday in July" on which day the equalization hearing should commence (see also section 193.29, Florida Statutes, 1941, as amended), which hearing should continue from day to day until completed. Section 193.29, Florida Statutes, 1941, as amended, requires that the tax assessor "immediately after the assessment . . . has been reviewed and equalized . . ." and the millage determined, carry out the total amount of county taxes, etc., which must be submitted to the board of county commissioners on the first Monday in October, when the original and copies of the tax roll are examined, compared and corrected. These statutes seem to contemplate that the millage should be determined and reported to the tax assessor in ample time for him to complete his tax roll and have it ready for submission to the county commissioners on the first Monday in October. A reasonable and ample time for the completion of the assessment roll so that it may be ready for the county commissioners by the first Monday in October is a question of fact which may differ from county to county.

The only reasonable answer that may be given to the foregoing question is that the millage should be determined and reported to the tax assessor in ample time for him to complete the tax rolls by the first Monday in October; however, determination as to what is a reasonable time may differ from county to county because of the size of the roll, number of entries, and numerous other considerations. From a practical standpoint, the millage should be determined, and the tax assessor should be advised of the same, as soon after the equalization of the tax assessments as is reasonably possible under the existing circumstances.

August 5, 1948.—048-261.

#### TAX ROLL—DISPOSITION—NOTATIONS

**QUESTIONS:** 1. When is the tax collector supposed to turn the tax roll over to the clerk of the circuit court?

2. Are notations showing disposition to be made by each and every parcel of land assessed on the roll?

*To Honorable Lloyd M. Hicks, Clerk Circuit Court, Manatee County, Bradenton, Florida:*

After the rolls have been made up and submitted, the original is delivered to the tax collector, a copy to the comptroller, and a copy to the clerk of the circuit court (section 193.29, Florida Statutes, 1941).

The tax collector is required, on or before the first Monday in July following the year in which such taxes were assessed, to make a final report and settlement with the county commissioners (section 193.50, Florida Statutes, 1941).

I find no law requiring the tax collector to turn over his roll to the clerk of the circuit court. In some of the counties the tax collector, as a matter of courtesy, does turn over his tax roll to the clerk of the circuit court, but as I said before, this is not mandatory. In other counties, I am informed, the tax collector does not turn over his tax roll to the clerk of the circuit court, but the clerk of the circuit court, when necessary, either inspects the tax roll in the tax collector's office or the said clerk takes his copy and conforms same to the notations, etc., made by the tax collector in his tax roll.

I know of no law requiring a notation showing disposition to be made by each and every parcel of land assessed on the tax collector's roll, but I assume that the tax collector does make sufficient notations to enable him or the clerk to conduct properly the future handling of the said tax roll. Sufficient notations to enable this to be done should be made.

January 21, 1947.—047-14.

#### LANDS SOLD UNDER CONTRACT—BACK ASSESSMENT

QUESTIONS: 1. Where the State Board of Education enters into a contract with some individual or corporation for the sale and conveyance of sixteenth section school lands, are such lands subject to county and district taxation after delivery of such a contract and prior to conveyance pursuant to such a contract?

2. Are such lands subject to the annual assessments of the Everglades drainage district after the delivery of such contract and prior to conveyance pursuant to such a contract?

3. If such lands are subject to such county and district taxation, and the annual assessments of the Everglades drainage district, may a tax assessor back assess said lands for all years subsequent to the delivery of the contract and prior to delivery of the conveyance pursuant to such contract, for which no taxes were assessed?

*To Honorable C. M. Gay, State Comptroller:*

The lands in question came to the state under an act of the Congress of the United States approved March 3, 1845 (5 Stat. 788) "for the support of public schools." Power of sale over these lands is vested in the State Board of Education (Section 229.08, Florida Statutes, 1941). Under the foregoing federal grant, and state constitutional provisions, neither the lands in question, nor the proceeds from the sale thereof, may be appropriated to other than the "support of public school." (Southern Drainage District v. State, 93 Fla. 672, 112 So. 561, text 567.) Therefore, the interest of the state (legal title to secure the payment of the remainder of the purchase price under the contract), is not subject to taxation or drainage assessments.

In the case of *S. R. A. v. State of Minnesota* (not yet reported), the Supreme Court of the United States, in a case involving the rights of the state to tax the interest of a vendee under a contract for deed from the federal government, held that the equity of such vendee was in fact the realty, and that such legal title as the federal government held was only as security. This holding of the federal supreme court was followed in the case of *Bancroft Investment Corporation v. City of Jacksonville*, (Fla.), 27 So. 2d. Adv. 162, text 171. In this state, as to contracts for deeds between individuals, it appears that the property should be taxed in the name of the vendee and not the vendor. (See *Porter v. Carroll*, 84 Fla. 62, 92 So. 809; *Dean v. State*, 74 Fla. 277, 77 So. 107; *Miami Bond and Mortgage*

Company v. Bell, 101 Fla. 1291, 133 So. 547; Aycock Brothers Lumber Company v. First National Bank, 54 Fla. 604, 45 So. 501; Harris v. Zeuch, 103 Fla. 183, 137 So. 135.)

According to the majority rule, lands purchased from the State under contract for deed are subject to taxation as property of the vendee, although the state's interest is exempt. (51 Am. Jur. 448 and 449, Section 430; Annotation in Ann. Cas. 1917 C 130 et seq.)

Under this rule the interest of the vendee of school lands from the state would seem to be subject to taxation.

Section 270.18, Florida Statutes, 1941, appears to contemplate the assessment of such lands; however, it provides that upon the reinstatement of the title in the state that any tax liens based upon such an assessment shall "represent a valid obligation against such lands" to be redeemed by the state. As applied to school lands, this provision may be invalid. Under the holding in the Southern Drainage District case, *supra*, I do not think that school funds may be used for such payments. I also doubt the authority to take other state funds, which are raised for state and not county or district purposes, for the purpose of making such payments. (59 C. J. 198 and 200, section 342; In Re. Opinion of Justices, 211 Mass. 624, 98 N. E. 611; Amos v. Mathews, 99 Fla. 1, 126 So. 308; State v. Segeng, (Minn.), 235 S. W. 380.)

From the foregoing statutes and authorities, it seems that the questions should be answered as follows:

(1) Where the State Board of Education enters into a contract with some individual or corporation for the sale and conveyance of sixteenth section school lands, such lands are subject to taxation after the delivery of such contract and prior to conveyance pursuant to such a contract. In this connection, I do not think that the provision in section 270.18, which states that any such taxes held by individuals shall "represent a valid obligation against such lands" after title is reinstated in the state, is effective as to school lands.

(2) Such lands are also subject to the annual assessments of the Everglades drainage district under the same limitations.

(3) Such lands are subject to back assessment under the same rules as are other lands. As to the assessments of the Everglades drainage district, back assessments should only be made by the tax assessor under certificates from the Board of Commissioners as provided in section 100, chapter 14717, acts 1931.

August 7, 1947.—047-240.

#### PERSONAL PROPERTY—RETURNS UNDER OATH— REASSESSMENT

QUESTION: Must an owner of personal property file his tax returns of such property under oath in order for the county commissioners to make equalization of the assessment of his said property in case of an excessive assessment?

*To Honorable C. M. Gay, State Comptroller:*

The answer to this question seems to depend upon the proper construction of sections 193.27, 200.11 and 200.19 to 200.22, Florida Statutes, 1941, and sections 192.57 and 193.27, Cumulative Supplement to Florida Statutes, 1941.

Section 193.27, Florida Statutes, 1941, provides for equalization of tax assessments by the Board of County Commissioners, but provides that "it shall be unlawful for the county commissioners to lower the assessment of any personal property given in by the owner or assessed by the assessor, which shall not have been specified under oath." Section 200.11, Florida Statutes, 1941, has reference to the listing of all the tax payer's personal

property under oath when a hearing upon the amount of the assessment fixed by the tax assessor is requested by him; this does not seem to be a tax return but merely a listing of his personal property for use at such hearing. Sections 200.19 to 200.22, Florida Statutes, 1941, relate to the equalization of the assessments by the county commissioners; the only reference to the oath of the taxpayer in these sections is in section 200.22, where the taxpayer is entitled to be "fully heard under oath." This oath is not in connection with the tax return but in connection with the equalization hearing. The only reference, in the foregoing sections, to an oath in connection with the tax return is the one in section 193.27 aforementioned.

Section 192.57, Cumulative Supplement to Florida Statutes, 1941, which was taken from chapter 21950, Laws of Florida, acts of 1943 (which became effective on June 8, 1943), provides that "no tax return . . . need be made under oath." This act contained no general repealer clause. This statute appears to have been intended to cover the entire subject of oaths to tax returns so as to repeal former provisions relating to the same subject matter (*Jernigan v. Holden*, 34 Fla. 530, 16 So. 413; *State v. Stoutamire*, 98 Fla. 486, 123 So. 834, 59 C. J. 919, Section 520). The phrase "no tax return . . . need be made under oath" seems to be all inclusive and excepts no tax returns. There only remains for consideration section 200.08 of the Cumulative Supplement.

It seems clear that chapter 21950, Laws of Florida, acts of 1943, had the effect of qualifying or modifying section 200.08, Florida Statutes, 1941, and deleted therefrom the requirement that tax returns of tangible personal property be made under oath; however, said section 200.08 was amended by chapter 22097, Laws of Florida, acts of 1943 (which became a law and took effect on June 14, 1943, subsequent to said chapter 21950), which amendment brought forward without substantial change the provision therein requiring that tax returns of intangible personal property be made under oath, except returns of household furniture, personal effects, etc. In the absence of clear intention to the contrary, a statute incorporated within an amendatory act, without any material or substantial change in its phraseology, takes its antiquity from its original enactment and is not deemed to have been reenacted by reason of being incorporated in the amendment (*Noonan v. City of Portland*, ..... Or. ...., 88 P. 2d. 808, text 822). Prior matters carried over into new enactments are not deemed new legislation (*People v. Lowell*, 250 Mich. 349, 230 N. W. 202; see also 59 C. J. 925, 928 and 1183, Sections 527, 530 and 719). Insofar as a new law is merely a reenactment of an earlier one, it will not repeal an intermediate law which qualified or limited the first one, but such intermediate law will be deemed to remain in force and to qualify or modify the new enactment in the same manner as it did the law amended (59 C. J. 927, (Section 528; in *Re Fergerson's Estate*, 325 Pa. 34, 189 A. 289; *Klemme v. Drainage District* 380 Ill. 221, 43 N. E. 966; *S. Buchsbaum and Company v. Goddon*, 389 Ill. 493, 59 N. E. 2d. 832).

When sections 193.27, 200.11 and 200.19 to 200.22, Florida Statutes, 1941, and sections 192.57 and 200.08 of Cumulative Supplement to said statutes are considered and construed together, I am of the opinion that tax returns of tangible personal property are not required to be made under oath; this being true the question should be answered in the negative. The answer being in the negative, the second question posed by the request becomes immaterial and need not be answered.

## TAX SALE CERTIFICATES AND TAX DEEDS

September 22, 1947.—047-310.

### OVERAGE FROM SALE—DISPOSITION OF SURPLUS

QUESTION: "A" makes application for a tax deed to the clerk of circuit court upon county certificates at a cost of \$50.00; \$100.00 worth



of city taxes and \$100.00 worth of special city liens remain outstanding. Upon a proper sale of the property upon the application for tax deed, the property is bid in by "B" for \$450.00, leaving a surplus of \$400.00. Who is entitled to receive the \$400.00 overage?

*To Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:*

In my opinion, the question is answered by section 194.22, Florida Statutes, 1941, which reads as follows:

"If the property shall be purchased for an amount in excess of the statutory bid of the certificate holder as provided in Section 194.21, such excess shall be forthwith paid over and disbursed by the clerk to the municipality and other taxing districts, if any, holding liens for general taxes of equal dignity with county taxes upon said property, for the payment of such liens in full, if such excess be sufficient for such purpose; provided, however, that in the event such excess be not sufficient to pay such liens in full, such municipality and each other taxing district shall be paid such excess on a proportionate basis in the same ratio to such excess as the amount of its said liens bears to the total amount of the said liens of the municipality and such taxing districts, and the municipality and other taxing districts shall retain liens upon said property for the remaining unpaid amount; and if there remains any excess after the payment of all liens for general taxes upon said property and there be unpaid liens for special assessments held by any municipality or other taxing district, the clerk shall pay such excess to such municipality and taxing district for the payment of such special assessment liens in full, if such be sufficient for such purpose; provided, however, that in the event such excess be not sufficient to pay all of such special assessment liens in full, such municipality and each other taxing district shall be paid such excess on the same basis as hereinbefore provided for the partial payment of general tax liens, except that no liens securing said special assessments shall be retained upon said property. After all liens for general taxes and special assessments of the municipality and other taxing districts upon said property are paid in full, the balance of the purchase price shall be retained by the clerk and notice mailed to the owner of such lands, if his address be known to the clerk, that this sum will be paid to him upon demand. The entire balance shall be paid to the owner, less the sum of twenty-five cents on each hundred dollars or fraction thereof, which the clerk may retain to reimburse himself for postage, notices, and keeping account of such funds. Laws 1941, chapter 20722, Section 31."

January 18, 1947.—047-22.

#### SALE OF LANDS—SURPLUS—CLAIMANT

QUESTION: On September 6, 1943, at the request of O. L. Wilkin-son, certain lands in Polk county were advertised and sold for the sum of \$375; the amount of taxes due thereon was \$27.97, thus leaving a surplus to be delivered to the record owners; on said September 6, 1943, the record owners were Gordon G. Marsh and W. D. Lodge; these owners were notified of the surplus but notice was returned unclaimed; on December 19, 1946, Gordon G. Marsh and W. D. Lodge, joined by their wives, conveyed the property to Roger B. Lyle; and Roger B. Lyle is now asking for this surplus. Should it be paid to Lyle?

*To Honorable D. H. Sloan, Jr., Clerk of the Circuit Court, Polk County, Bartow, Florida:*

I assume that section 194.23, Florida Statutes, 1941, has been complied with.

In my opinion, Mr. Lyle should furnish the county commissioners with an assignment of this claim from Marsh and Lodge to himself in order that they will not be embarrassed if the said Marsh and Lodge should call on them, or their successors, for such surplus.

In the absence of such an assignment or court order requiring them to pay the surplus to Lyle, I could not advise them to pay same.

I recognize the fact that a deed from Marsh and Lodge to Mr. Lyle might carry with it the said surplus, but I cannot find where this point has been decided by the Florida courts.

March 4, 1948.—048-76.

#### MUNICIPAL PROPERTY—FORECLOSURE

QUESTION: Are lands owned by a municipality prior to May, 1943, that were purchased by the municipality from the Trustees of the Internal Improvement Fund, subject to the provisions of section 194.47 (7), 1945 Cumulative Supplement to Florida Statutes, 1941, and should the county share in the proceeds of the sale of such lands when they are sold by the municipality?

*To Honorable C. M. Gay, State Comptroller:*

Section 194.47 (7), 1945 Supplement to Florida Statutes, 1941, reads, in part, as follows:

"(7) Property held by municipalities under foreclosure.—All lands foreclosed by municipalities for delinquent taxes, or special improvement liens, or to which such municipalities acquired title prior to the first day of May, 1943, shall not be subject to the judicial proceedings by the county as herein provided, and shall not be included in the list required to be prepared by the clerk, nor included in the proceedings herein provided."

As I read this section, it refers to lands held by municipalities acquired by them in connection with tax proceedings and not property acquired by municipalities in other ways.

Having reached this conclusion, I answer the question in the negative.

March 19, 1947.—047-89.

#### HARDSHIP CASE—HEIRS OF OWNER

QUESTIONS: 1. Where former owner of "county lands acquired for delinquent taxes" is deceased, may his heirs or devisees, or the personal representative, purchase said lands, under chapter 22870, Laws of Florida, acts of 1945 (sections 194.47-1 to 194.47-4, 1945 Cumulative Supplement to Florida Statutes, 1941), as a hardship case?

2. If there are several heirs or devisees, may one or more of them purchase said lands under the statute aforesaid, as a hardship case, in his or their own name or account, and not as agent or agents for the other heirs or devisees?

3. If either or both of the foregoing questions are answered in the affirmative, to whom should the deed be made?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 22870, Laws of Florida, acts of 1945, provides which "county lands acquired for delinquent taxes," title to which remains in the county, may be conveyed by the Board of County Commissioners "to the record fee simple owner of such lands as of the date of the final decree whereby the title to such lands became quieted in the county," upon the payment of a sum equal to all taxes due with interest and costs. The evident intent of the statute was to permit the record fee simple owner as of the date of the final decree to repurchase his lands lost to the county for delinquent taxes. The record fee simple owner may repurchase only under certain circumstances which might amount to a hardship in case he was not permitted to redeem or repurchase.

The right to redeem or repurchase, under the foregoing statute, is to the record fee simple owner as of the date of the final decree; in other words, the statute defines the owner entitled to redeem or repurchase. Persons not within the statutory definition are not permitted to redeem or repurchase (61 C. J. 1245, Section 1691).

As cotenants, one cotenant may redeem, although not obliged to do so; but, if he does redeem, as a rule he must redeem the entire estate, not merely his undivided interest; however, in so doing he will have a claim against his cotenants for reimbursement. Some authorities hold that one cotenant may redeem his undivided share without redeeming other interests (61 C. J. 1249, Section 1698).

Usually the heir or devisee succeeds to the rights of the decedent in matters of this kind. In the light of these authorities, I am of the opinion that the heirs or devisees, as the case may be, of a deceased owner coming within the statute, have the right to repurchase the lands of the decedent to the same extent he would have had he lived. Although one of such heirs or devisees would seem to have the right to redeem or repurchase the lands in question of all such heirs or devisees, he would have no right to purchase the same for his own account to the exclusion of any others. If the property is needed as assets of the estate for the payment of claims, I am of the further opinion that the personal representative might redeem in the name of the heirs or devisees with the right to use the lands for the payment of claims as in other cases of the lands of decedent. In any case, the lands should be deeded to all the heirs or devisees, as the case may be, by the county commissioners, in the absence of written authority from all such heirs or devisees to do otherwise. It would seem that such conveyance might also be made to an agent or trustee for all.

It seems that the first question should be answered in the affirmative; the second question in the negative; and the third question by stating that the deed should run to the several heirs or devisees, as the case may be, in the absence of written authority from all the heirs or devisees. The deed should run to the heirs or devisees by name and not by class.

April 2, 1947.—047-94.

**TIME WHEN TITLE VESTS—COUNTY CERTIFICATE**

**QUESTION:** On June 1, 1943, land in Volusia county which had not been redeemed or assigned, was sold by the tax collector to the county at the tax collector's sale. At the expiration of two years a suit was brought upon these certificates as provided by law for the purpose of having the title thereto vest in the county. The suit on the 1943 tax sale certificates was instituted on December 14, 1945, in the Circuit Court of Volusia County, Florida, and the final decree rendered therein on the 30th day of January, 1947. Section 1 of chapter 22870, Laws of 1945 (194.47-1, Florida Statutes, 1941), provides that lands acquired prior to January 1, 1946, under the provisions of chapter 22079, acts of 1943 (194.47, Florida Statutes 1941), can be redeemed under certain circum-

stances by the original fee simple owner. Did the title to these lots actually vest in Volusia county, Florida, as of the date the certificates were two years old, which was on to-wit: June 2, 1945, or whether contemplated by this act when the final decree was entered of record, to-wit: on January 30, 1947?

*To Honorable Jess Mathas, Clerk of Circuit Court, Volusia County, DeLand, Florida:*

I think that a careful reading of said sections 194.47-1, and 194.47, Florida Statutes, 1941, must lead to the conclusion that the title to the land became vested in the county on the date when the final decree was entered of record, to-wit: January 30, 1947.

Said chapter 22079 (section 194.47, Florida Statutes, 1941, as amended) has for its purpose the vesting of title to land, on which the county (and in some instances, the state) holds tax certificates, in the county by a bill in chancery, and provides for the proceedings to be had in such a suit. Said chapter provides that a decree rendered in said suit "shall decree the fee simple title in and to the lands described in said bill of complaint and decree to be absolutely vested in said county." Title is thus required by the county, in my opinion, under chapter 22079 (section 194.47, Florida Statutes, 1941, as amended), when such a decree is entered by the court.

Inasmuch as the decree on the lands mentioned was entered on January 30, 1947, I do not think the provisions of chapter 22870 (section 194.47-1, known as the 'Hardship Statute'), would apply as that applies only to lands acquired by the county prior to January 1, 1946, under the provisions of chapter 22079, acts of 1943 (section 194.47, Florida Statutes, 1941, as amended).

February 12, 1948.—048-52.

#### MURPHY ACT—20-YEAR-OLD CERTIFICATES

**QUESTION:** Where two or more tax sale certificates, encumbering the same lands but issued in separate years, were purchased under the Murphy act (chapter 18296, acts of 1937), and one or more, but less than all, of which are now twenty or more years old, which of these certificates if any at all, should be cancelled under chapter 23828, Laws of Florida, acts of 1947?

*To Honorable Ray E. Green, Clerk of the Circuit Court, Clearwater, Florida:*

The purpose of chapter 23828, Laws of Florida, acts of 1947, appears to have been to make provision for the cancellation of tax sale certificates barred by the limitations of section 196.12, Florida Statutes, 1941 (chapter 19515, Laws of Florida, acts of 1939). This office has so held in several opinions involving the said 1947 act (see opinion numbers 047-262, 355 and 432). The preamble to said chapter 23828, recites that:

"WHEREAS, under the provisions of Chapter 19515, Laws of Florida, Acts 1939 Legislature being Section 196.12, Florida Statutes, 1941, a period of 20 years from the date of the issuance thereof is declared to be the life of any tax sale certificates . . .

"AND WHEREAS, in the interest of the public and of orderly efficient administration of the office of the Clerk of the Circuit Court, provision should be made to note the cancellation or invalidity of such tax sale certificates upon the official records . . ."

Although the body of the act seems to be broader than the preamble, I am of the opinion that the body of the act should be read in connection with the said preamble. This construction limits cancellation to those tax sale certificates barred by section 196.12, Florida Statutes, 1941.



The last paragraph of said section 196.12 provides that:

"The provisions and the limitations herein prescribed for tax certificates shall not apply to tax certificates which were sold under the provisions of chapter 18296, acts 1937, Laws of Florida, commonly known as the Murphy act."

Furthermore, under section 192.36 certain tax sale certificates (encumbering homesteads), purchased under the Murphy act in 1938 and 1939 are not yet subject to enforcement; to construe chapter 23828 as applying to such Murphy act certificates would amount to taking private property without due process of law.

The foregoing question must be answered by stating that chapter 23828, Laws of Florida, acts of 1947, has no application to Murphy act certificates held by individuals.

February 25, 1948.—048-72.

#### TAX CERTIFICATES CANCELLATION—SUBSEQUENT TAXES

**QUESTION:** A person purchases a 1927 tax certificate and at the same time pays the taxes on subsequent certificates. Such subsequent certificates were never advertised for sale by the tax collector but were marked cancelled and surrendered with the older certificates. May the purchaser now demand the issuance of one of such subsequent certificates and thereby contend, that such certificate not being twenty years old, he has the right to demand a tax deed thereon?

*To Honorable C. M. Gay, State Comptroller:*

The question indicates that the tax certificates in question may have been purchased under the Murphy act or chapter 18296, Laws of Florida, acts of 1937. If this is true then chapter 23828, Laws of Florida, acts of 1947, has no application as it does not apply to Murphy act certificates (see opinion 048-52, dated February 12, 1948).

Where a tax sale certificate owned by the state or county is purchased, the purchaser is required to pay all subsequent unpaid and omitted taxes on the property encumbered by the certificate purchased (sections 194.06 and 194.45, Florida Statutes, 1941). Such unpaid and omitted taxes seem to be attached to the prior tax certificate. The intent and purpose of these statutes is to require the purchase not only of the tax certificate itself but also all other state and county owned tax certificates and subsequent unpaid taxes encumbering the said property. The better practice, and the one doubtless contemplated by the statutes, would be to include the subsequent unpaid taxes and tax certificates in the assignment of the tax sale certificate and not cancel them of record unless so requested by the purchaser. Where there is more than one tax certificate encumbering the sale of land held by the state or county any one of them, except the last one, may be redeemed without redeeming the others (section 194.08). This indicates that the several certificates are not merged into the first one.

Under chapter 23828, Laws of Florida, acts of 1947, only tax certificates twenty years old or older are cancelled, which cancellation would include subsequent and omitted taxes attached to the certificate in question, but not subsequent tax certificates not twenty years old. Such subsequent tax certificates remain in full force and effect until barred by the said twenty-year-statute, unless otherwise properly cancelled. Tax sale certificates properly cancelled cannot be revived and reissued. Whether or not any tax sale certificate has been cancelled might become a question of fact or a mixed question of fact and law, so that no general rule may be laid down upon this question.

Assuming that the subsequent tax sale certificates mentioned in the question were properly cancelled, I do not see how any of them may be revived and reissued and tax deeds issued thereon. Whether or not they were properly cancelled and whether or not the clerk had authority to cancel them, as stated in the question, would be a separate question upon which I do not express an opinion and concerning which I have no facts from which an opinion might be expressed.

March 5, 1948.—048-80.

FORECLOSURE CERTIFICATES—CANCELLATION—  
LIMITATION

**QUESTION:** What construction should be placed upon section 196.12 Florida Statutes, 1941, and chapter 23828, Laws of Florida, acts of 1947, where tax sale certificates become twenty years old after title vests in the county under section 194.47, Cumulative Supplement to Florida Statutes, 1941, but before the entry of final decree perfecting title in the county?

*To Fishback, Smith and Williams, Suite 11, Rutland Building, Orlando, Florida:*

I presume that the certificates in question are not Murphy act certificates, as section 196.12 and chapter 23828 aforementioned, do not seem to have any application to Murphy act certificates. (See opinion 048-52, dated February 12, 1948.)

For the purpose of this opinion I assume that title vests in the county when county-held tax sale certificates become two years of age (see section 193.64, Florida Statutes, 1941), although I doubt that title actually vests until the entry of the final decree under said section 194.47. I do not think the question of time of vesting of title material here, as certificate owners generally would have until the return day of the process (subsection 3, section 194.47), or maybe until the entry of the decree (*Pinellas County v. Banks*, 154 Fla. 582, 19 So. 2d 1, text 4), within which to protect their interests.

Owners of tax sale certificates within the purview of section 196.12 and chapter 23828 may enforce their certificates at any time until they become twenty years old. When a certificate becomes twenty years old no action may be maintained thereon and no tax deed may be issued therefor. Doubtless the Legislature intended by this provision that proceedings for collection or for tax deed must be instituted within said twenty years.

When a county foreclosure proceeding is instituted the owner of the certificates becomes or should be made a party thereto. When a county files a foreclosure suit making the certificate holder a party such certificate holder by counter-claim or answer may request enforcement of his certificate. Although there seems to be some conflict of opinion, I believe the filing of the suit by the county wherein the certificate holder is a party defendant probably tolls the statute of limitation in question as of the date of the filing of the proceeding (see 37 C. J. 1047, section 460 and Annotation in 127 A. L. R. 909 et seq.).

I am, therefore, of the opinion that if the tax sale certificate in question becomes twenty years of age before the filing of the foreclosure by the county under section 194.47 that it is subject to cancellation, but if it becomes twenty years old after the filing of the suit then the limitation is tolled so that the lien of the certificate should be disposed of by the decree and no cancellation under chapter 23828 should be made.

August 4, 1947.—047-262.

ASSIGNED CERTIFICATES—CANCELLATION—REVERSION

QUESTION: What is the effect of chapters 23828 and 23832, acts of 1947, on subsequent certificates under the Murphy act which are not twenty years old?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 23828, in part, reads as follows:

"After the expiration of twenty years from the date of issuance of any tax sale certificate issued against any lands in the State of Florida, whether issued for State taxes, State and County taxes, County taxes, or issued by a municipality for municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, and no application for tax deed thereon, or other administrative or legal proceedings is pending involving said tax sale certificate, the several Clerks of the Circuit Court of the State of Florida are authorized, empowered and directed to note the cancellation by this act of such twenty year old tax sale certificate upon any and all records thereof in the office of such Clerk."

Chapter 23832, in part, reads as follows:

"The Clerks of the Circuit Court of the several counties of the State of Florida are hereby authorized, empowered, and directed to note the cancellation by this Act of any and all tax sale certificates issued prior to the year 1940, whether issued for State taxes, State and County taxes, or Municipal taxes, and held by any private holder, natural or corporate, partnership, trustee estate of deceased person, or other person or persons under disability or otherwise, where the land covered by such tax sale certificates heretofore reverted to the State of Florida for nonpayment of delinquent taxes under the provisions of Chapter 18296, Acts of 1937, Florida Legislature, also known as the Murphy Act, being Section 192.38 et seq., Florida Statutes, 1941."

I assume for the purpose of this opinion that these two laws are constitutional.

It is indicated from the file that the precise statement on which advice is sought arises from the following facts: In a certain county of the state there appears one piece of property against which there were issued the following: certificate No. 2414 of 1927; certificate No. 2109 of 1931; and certificate No. 10692 of 1933 (a Futch certificate); when certificate No. 2414 of 1927 is twenty years old, would the certificates which are not then twenty years old, that is, certificate No. 2109 of 1931 and certificate No. 10692 of 1933, be cancelled in connection with and as a part having been assigned with said certificate No. 2414, bearing in mind the supreme court case of *Hurner vs. Culbreath*, 192 So. 814, which seems to hold that subsequent certificates under chapter 18296 are assigned or redeemed in connection with the oldest certificate?

Assuming that the decision of the supreme court is as stated, I do not think that the court in rendering that opinion meant its opinion to be extended to hold that assigned certificates were merged with the oldest certificates to the extent that when the Legislature enacted said chapters 23828 and 23832, it had in mind the cancellation of assigned certificates.

In my opinion, the Legislature had in mind the cancellation of only those certificates which are in fact twenty years old as provided for in said chapter 23828, and in all tax certificates issued prior to the year 1940 where the land covered by such tax sale certificates had heretofore reverted to the State of Florida under the Murphy act, as provided in chapter 23832.

August 8, 1947.—047-251.

1933 CERTIFICATES—PURCHASE OF CERTIFICATES—  
COMPUTING AMOUNT DUE

QUESTIONS: 1. Under chapter 18296, many individuals purchased the 1933 tax certificates on property, and included with those certificates were the prior tax certificates, some of them being of 1927 and prior dates. If those certificates are to be cancelled, how shall we compute the amount due the purchaser in a redemption of the 1933 certificate?

2. The face of the oldest certificate with the costs has been used; interest computed on both. Should the 1933 tax certificate be used as the oldest, if the oldest certificate is of 1927 or prior date?

*To Honorable C. M. Gay, State Comptroller:*

On August 4, 1947, I rendered an opinion on the construction of these same chapters, 23828 and 23832, acts of 1947, in which I held that the Legislature had in mind the cancellation of only those certificates which were in fact twenty years old as provided in chapter 23828, and all tax certificates issued prior to the year 1940, where the land covered by such tax sale certificates had heretofore reverted to the State of Florida under the so-called "Murphy Act," as provided for in chapter 23832.

In the light of that opinion and assuming from the question that the 1933 tax certificate is the oldest certificate not twenty years old, in my opinion, the said 1933 tax certificate should be used in computing the amount due the purchaser.

I realize that in some instances this would cancel subsequent taxes but I think this was the intention of the Legislature.

This opinion does not seek to pass upon the constitutionality of these two 1947 acts, or either of them; this is a matter which the courts must decide.

This opinion does not intend to cover the situation where individuals own tax sale certificates on lands which had reverted to the State of Florida under the so-called "Murphy Act."

September 8, 1947.—047-288.

20-YEAR-OLD CERTIFICATES—  
LIMITATION AGAINST CERTIFICATE

QUESTION: Chapter 19515, Laws of Florida, 1939, nulls and voids tax certificates after a 20-year period. Chapter 23828, Laws of Florida, 1947, directs the clerk to cancel 20-year old certificates on the first of January, 1948. Was this time limit, until January 1, 1948, given to allow the holder of a 20-year old certificate to liquidate it?

*To Honorable E. B. Leatherman, Clerk of Circuit Court, Dade County, Miami, Florida:*

I do not think that the Legislature in passing chapter 23828, supra, had in mind to remove the limitation against a tax certificate twenty years old, as provided by chapter 19515, Laws of Florida, 1939; neither do I think that it intended to, nor does, breathe life into such certificates.

In my opinion, the purpose of the time element provided in chapter 23828, to wit: 12:01 o'clock A.M., the first day of January A.D. 1947, was to give to the clerks of the circuit courts sufficient time to prepare their records for the cancellation of such tax sale certificates.

I, therefore, answer the question in the negative.



October 9, 1947.—047-355.

DRAINAGE CERTIFICATES—VALID TAX DEEDS—  
CERTIFICATES REVIVED

QUESTIONS: 1. Does chapter 23828, Laws of Florida, 1947, refer to tax sale certificates issued by drainage districts?

2. Numerous tax deed applications based upon tax certificates that were twenty years old on August 1, 1947, have been made in this office and were made prior to August 1, 1947, and all other taxes paid in some instances. Are these certificates valid now and until January 1, 1948, and must tax deeds be issued before January 1, 1948?

*To Honorable E. B. Leatherman, Clerk of Circuit Court, Dade County, Miami, Florida:*

Section 1 of chapter 23828, Laws of Florida, 1947, reads as follows:

"After the expiration of twenty years from the date of issuance of any tax sale certificate issued against any lands in the State of Florida, whether issued for state taxes, state and county taxes, county taxes, or issued by a municipality for municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, and no application for tax deed thereon, or other administrative or legal proceeding is pending involving said tax sale certificate, the several clerks of the circuit court of the State of Florida are authorized, empowered and directed to note the cancellation by this act of such twenty year old tax sale certificate upon any and all records thereof in the office of such Clerk."

37 Am. Jur. Section 6, Municipal Corporation, page 624, says:

"In addition to the corporations and quasi corporations formed for purposes of general local administration, the legislature frequently organizes the people of a certain territory into a district having certain limited powers for the carrying out of some particular public purpose. Familiar examples are school districts, road districts, fire districts, water-supply districts, irrigation districts, levee districts, etc. Such districts are mere quasi corporations. Taxing districts and other incorporated governmental agencies of the state, while not technically municipal corporations, are at least quasi ones, and, as to their powers, are governed by the rules applicable to municipal corporations."

"Drainage districts are in a broad sense municipal organizations," (Ronald vs. Ryan, 26 So. (2) 339.)

It is my opinion that the Legislature did not in this act intend to place drainage tax sale certificates on a superior plane to county tax certificates, and that when it used the word municipality, it had in mind and intended to cover tax sale certificates issued by drainage districts, and in doing so used the term "municipality" in its broad sense. I am not unmindful of the fact that the Supreme Court of Florida has said that "Such assessments or charges (drainage taxes) are a peculiar species of taxation distinct from the general burden imposed for state, county and municipal purposes." (Lainhart vs. Catts, 75 So. 47, text 52.) Inasmuch as such drainage districts can be embraced in the term "municipality" I answer the first question in the affirmative.

Answering the second question, the purpose of chapter 23828 was merely to make provision for the clerks of the court to note the cancellation or invalidity of such tax sale certificates as were barred by chapter

19515, acts of the Legislature, 1939 (section 196.12, Florida Statutes, 1941). It did not, in my opinion, have the effect of reviving certificates already barred by said 1939 act; therefore, I answer the second question in the negative.

December 16, 1947.—047-432.

#### COUNTY TAX PROPERTY—20-YEAR OLD CERTIFICATE

**QUESTION:** When a tax sale certificate is not twenty years old when the county takes title to the property but becomes twenty years old in the interim before the property is sold by the county, is the holder of such tax sale certificate entitled to any part of the proceeds from the sale of the property?

*To Honorable C. M. Gay, State Comptroller:*

Section 1, chapter 23828, Laws of Florida, acts of 1947, provided for the cancellation, by the clerks of the circuit courts, of tax sale certificates in the hands of private holders, after the expiration of twenty years from and after the date of issuance of such certificates. (See 1947 Attorney General's Opinions numbered 251, 262, 288 and 355, citing this chapter.) The purpose of this chapter was merely to make provision for the cancellation of tax sale certificates barred by the limitations of section 196.12, Florida Statutes, 1941. (Chapter 19515, Laws of Florida, acts of 1939).

Under section 194.47, Florida Statutes, 1941, as amended, individual holders of outstanding tax sale certificates may become parties defendant to tax foreclosure suits by counties and be relegated to their rights under the law to participate ratably with other lien holders in the proceeds of any sale by the county as provided by section 194.55, Florida Statutes, 1941, as amended. In lieu of permitting himself to become a party to the county's suit, such tax certificate holder may purchase the county's certificates and apply for a tax deed. (See *Pinellas County v. Banks*, 154 Fla. 582, 19 So. 2nd. 1, text 4.)

I am presuming that the question propounded in request for opinion contemplates that the owner and holder of the tax sale certificate in question was made a party defendant to the county's foreclosure suit and that his interests were recognized by the proceedings, and that he would be entitled to participate ratably with other lien holders in the proceeds of a sale by the county, under sections 194.47 and 194.55, Florida Statutes, 1941, as amended, except for the fact that his certificate became more than twenty years old after the county's foreclosure proceedings under said section 194.47.

Upon the filing of the county's foreclosure proceedings and the giving of notice by publication, the court obtained "jurisdiction of all of said lands and of all parties interested therein or having any lien thereon at the date of filing such suit." Upon sale of the lands by the county "individually held county tax sale certificates shall participate pro rata" in the proceeds of the sale. Upon the entry of the final decree in the county's foreclosure proceeding the rights of the individually held tax sale certificates are transferred from the lands to the proceeds of sale as and when sold by the county. His rights are merged with the decree of foreclosure; only his right to share in the proceeds remains. After foreclosure he has no right to foreclose or apply for a tax deed based upon his said tax sale certificate. There is no longer any tax sale certificate and tax lien. His further rights are under the statute to share in the proceeds of sale.

In the light of the foregoing observations the question should be answered in the affirmative.

November 4, 1947.—047-373.

LAND PURCHASED BY COMMISSION—SALE OF COUNTY LANDS

QUESTION: Is it legal for a member of the Board of County Commissioners to purchase land from the county by open bid, which land has been foreclosed by the county under chapter 194, Florida Statutes of 1941?

*To Honorable C. M. Gay, State Comptroller:*

Section 194.55 (2), Florida Statutes, 1941, authorizes the boards of county commissioners to sell at public sale and convey the lands, which have been foreclosed under chapter 194, and the manner of the sale is therein set forth; subsection (3) sets forth the form of the deed and permits a majority of the members of the Board of County Commissioners to sign the deed.

It is my opinion that if the sale of land is held in strict conformity with the said law and the public is given full and free opportunity to bid on the property, there is no reason why a member of the Board of County Commissioners cannot become a purchaser of said property, at such public sale.

I assume, as I said before, the law will be strictly carried out and everything done in an open, legal and bona fide manner.

June 15, 1948.—048-196.

REDEMPTION OF TAX SALE CERTIFICATES—ERROR BY CLERK  
IN CALCULATION

QUESTIONS: 1. Where the clerk of the circuit court, in calculating the amount necessary to redeem an individually owned tax sale certificate, uses a wrong amount as the basis for his calculation so that the proper amount necessary for redemption is not paid, may the said clerk pay the balance due from his miscellaneous expense account?

2. If said balance due may be paid from the said miscellaneous expense account, to what date should interest be computed upon the unpaid balance?

3. If said balance may not be paid from the said miscellaneous expense account, or in lieu of payment from such account if it may be paid therefrom, may the clerk refund or tender for refund the amount paid for the attempted redemption and void the receipt given for payment and permit the certificate holder to apply for tax deed or foreclose the lien of the certificate in question?

4. If the answers to the foregoing questions are in the negative, then is the clerk directly responsible for the unpaid balance due upon the certificate in question?

*To Honorable C. M. Gay, State Comptroller:*

It appears from the request for opinion and the file submitted therewith that the tax sale certificate in question was in the principal amount of \$20.71. However, the clerk of the circuit court, when application to redeem was made, erroneously calculated the same upon a principal amount of \$3.99. The amount necessary to redeem, at the time of calculation, was \$34.12 instead of \$15.65 as calculated by the clerk. Subsequent to the attempted redemption the clerk found his mistake. A partition proceeding was pending at the time of the attempted redemption in which proceeding the clerk was directed by order of the court to pay the said taxes from the funds in court, which funds were evidently derived from a sale of the property in question upon a finding that the same could not be partitioned without a sale thereof. The said order directed the payment of taxes in the amount of \$15.65, which order was evidently based upon the calculation

made by the clerk. I am not advised whether the owner and holder of the tax sale certificate in question was made a party to the partition proceeding or not. -

Under the statutes of this state the clerk of the circuit court is the agent of the individual holders of tax sale certificates, issued by the state or county, for the purpose of redemption and is duly authorized and empowered to permit the redemption of such certificates (section 192.02, Florida Statutes, 1941). Where a clerk fails to collect the full consideration prescribed by law for the redemption of a tax sale certificate, but in lieu of the full amount required collects a lesser amount, the attempted redemption should not be disregarded as being null and void (51 Am. Jur. 839 and 977, sections 954 and 1133; 61 C. J. 961, section 1237). A majority of the courts appear to hold that redemption results; even through mistake of the proper officer the amount paid is less than that properly required (Annotations in 107 A.L.R. 573 and 118 A.L.R. 578). The courts of some states have expressed the view that under similar circumstances a redemption results and that the remedy of the tax lien holder is against the officer making the error (Annotation 118 A.L.R. 586), although a few cases seem to hold that the landowner may be personally liable for the deficiency to the officer or the tax lien holder (*Hintrager v. Mahoney*, 78 Iowa 537, 43 N. W. 522; *Converse v. Rankin*, 115 Ill. 398, 4 N. E. 504; *Burch v. Nippress*, 213 Mich. 185, 181 N. W. 987). The supreme court of this state seems to have adopted the rule making the clerk answerable for the deficiency due the tax lien holder, in the case of *Pent v. Forest Hills Holding Corporation*, 152 Fla. 190, 5 So. 2d 873, text 875, when they held that the ex-clerk who permitted the redemption for less than the amount due should be made a party to any suit involving the question. The court said that "this is true because if Myrtle Culbreath allowed redemption of certificates for less than the lawful amount required to redeem the same she, as clerk, became answerable for the deficiency due the plaintiff" as holder of the tax sale certificates involved in said suit.

In the light of the foregoing observations, and the rule adopted by the supreme court in the last cited case, it seems that the first question must be answered in the negative; the second question need not be answered; the third question in the negative; and the fourth or last question in the affirmative. The question of liability of the owners of the land in question to the clerk for the deficiency is personal and between said parties and is not passed upon in this opinion.

November 24, 1948.—048-355.

#### DELINQUENT EVERGLADES FIRE CONTROL ASSESSMENTS

**QUESTION:** May tax sale certificates issued for delinquent Everglades Fire Control assessments pursuant to section 3, chapter 10116, Laws of Florida, acts of 1925, be cancelled of record without the payment of such assessments?

*To Honorable C. M. Gay, State Comptroller:*

Said section 3, chapter 10116, Laws of Florida, acts of 1925, provided for a levy of an assessment or taxes for the use of a fire control board, established by the said act, in controlling fires within the Everglades Drainage District. Under the said act said assessments or taxes were "certified to the tax assessors . . . and collected in the same manner as other taxes within the Everglades Drainage District."

Said section 3, chapter 10116, was repealed by section 1, chapter 13634, and section 2, chapter 14508, Laws of Florida, acts of 1929. Section 3 of said chapter 14508, provides,

"That all moneys which are now in the hands of the State Treasurer, belonging to the 'Fire Tax Fund' of Everglades Drainage District and any moneys which may hereafter be received as



the proceeds of taxes levied under the provisions of said chapter 10116, Laws of Florida, acts of 1925, and any moneys which may be hereafter received upon account of tax sale certificates heretofore or hereafter issued for the non-payment of taxes levied in pursuance of said chapter 10116, Laws of Florida, acts of 1925, shall be held by the said State Treasurer for the account of Everglades Drainage District as other moneys of said District are held, and all debts which may heretofore have been lawfully contracted under the provisions of said chapter 10116, Law of Florida, acts of 1925, shall be paid by Everglades Drainage District."

I am of the opinion that, by reason of said section 3, chapter 14508, Laws of Florida, acts of 1929, which section does not appear to have been repealed or otherwise affected by subsequent legislation, no tax sale certificate issued for delinquent Everglades Fire Control assessment pursuant to section 3, chapter 10116, Laws of Florida, acts of 1925, may be cancelled of record without the payment of such assessment in the absence of order of a court of competent jurisdiction. The said tax sale certificates may be redeemed.

### TAXES ON RAILROADS

July 21, 1947.—047-211.

#### REINCORPORATED CITY—TIME FOR ASSESSMENT— NOTIFICATION

**QUESTION:** Where a municipal corporation was incorporated, under the general laws of this state, on August 15, 1946, and was reincorporated by the Legislature, by local act, during the 1947 regular session of said Legislature, should the state comptroller notify such municipal corporation of the mileage apportionment of rolling stock and other property of railroads and telegraph lines passing through such corporation?

*To Honorable C. M. Gay, State Comptroller:*

The municipal corporation of "Bal Harbor Village" was incorporated, under the general laws of this state, on August 15, 1946. Section 1, chapter 24386, Laws of Florida, acts of 1947, which reincorporated the said municipal corporation, provided that the "Village of Bal Harbor, within the corporate limits as now established or hereafter established in the manner provided by law, shall continue to be a municipal body politic and corporate in perpetuity, under the name of 'Bal Harbor Village'." Section 77 of the said act preserves the validity of all acts done by the village council prior to the passage of the act. These provisions in the 1947 act indicate an intent on the part of the Legislature to continue an existing municipal corporation under a legislative charter instead of its existing charter under the general law. It seems that said Bal Harbor Village should be considered as having existed on January 1, 1947, for taxation purposes. (See *Broughton v. Pensacola*, 93 U.S. 266, 23 L. Ed. 896.)

It, therefore, appears that the question should be answered in the affirmative.

May 19, 1948.—048-170.

#### RAILROAD INTANGIBLE AND PERSONAL PROPERTY TAXATION— BACK TAXES

**QUESTIONS:** 1. In what manner, and by whom, should intangible personal property held and used by a railroad for operating purposes be assessed under the statutes of this state?

2. Where such intangible personal property has escaped taxation for a period of several years may it be assessed for such years?

*To Honorable C. M. Gay, State Comptroller:*

The supreme court of this state, in the case of *Simpson v. Loftin*, ..... Fla. ...., 33 So. 2d. Adv. 230, text 232, held that intangible personal property held and used by a railroad "exclusively for operating purposes . . . must be assessed . . . by the comptroller or the railroad assessment board, and the county taxing authorities . . . have no authority whatever to impose taxes on them." This holding of the supreme court is "predicated on section 195.01, Florida Statutes, 1941, under which the unit system of taxing railroad properties was inaugurated. Insofar as applicable here, this statute requires that every 'railroad company . . . annually, on or before the first Monday in March, return to the comptroller of the state . . . (certain railroad property) . . . and other personal property used or to be used in connection with the construction, operation or maintenance of the property of the company . . .'" (*Simpson v. Loftin*, supra.) The statutes "further provides that if such returns are not made to the comptroller in the manner provided, then the comptroller, attorney general and the state treasurer (railroad assessment board) shall assess the properties from the best information available . . ." and apportion the valuation to the several counties as is provided by said statutes (*Simpson v. Loftin*, supra). The purpose of the statutes providing for assessment of railroad properties "is to treat the physical properties, intangible properties and capital stock of the railroad as a unit for taxation and to distribute the assessed value thereof to the counties and other units of government in proportion to mileage." (*Simpson v. Loftin*, supra.) Intangible personal property of railroads used or to be used for the purposes mentioned in the statutes should be assessed in the same manner as other railroad property used for operating purposes are taxed. This answers the first question.

Section 199.29, Florida Statutes, 1941, states that intangible personal property which has for any reason escaped taxation may be back-assessed for a period of three years. To the same effect, as to property generally, see also section 193.23, Florida Statutes, 1941. Under these sections of the statutes the state comptroller or railroad assessment board may, under chapter 195, Florida Statutes, 1941, make back assessments of railroad properties within the purview of said chapter where such properties have escaped taxation within the purview of such laws. The question of whether or not such property has escaped taxation would be a question of fact to be determined by the comptroller or railroad assessment board. This answers the second question.

In the case of current assessment, or of back assessment, of such intangible personal property of railroads, in the light of chapter 199, Florida Statutes, 1941, it would seem that such assessment of intangible personal property should be made separate from the assessment of real and tangible personal property of railroads and separately certified to the tax assessors of the county to be placed upon the intangible personal property tax rolls of the counties.

## COURT PROCEEDINGS RELATING TO TAXATION

December 17, 1947.—047-423.

### SALE OF CERTIFICATES—EFFECT OF OMITTED TAXES

QUESTION: Where the enforcement of a tax sale certificate is barred by the limitations fixed by section 196.12, Florida Statutes, 1941, what is the effect of said statute upon any omitted taxes attached to said tax sale certificate?

*To Honorable Ted Cabot, Clerk, Circuit Court, Fort Lauderdale, Florida:*

Where there are no bidders for any delinquent tax on real property, at a county tax sale, the tax collector bids off said taxes for the county

(section 193.54, Florida Statutes, 1941), and the certificate is issued to the county. After a tax sale certificate is issued to the county as aforesaid, the tax assessor in making up future assessment rolls, so long as the county holds such certificate, "shall place thereon the lands upon which taxes have been sold to the county, and shall enter their valuation of the same on the roll, and mark against such lands on the said rolls, the words 'county tax certificate,' but the tax assessor shall not extend the taxes upon such lands." In calculating millage the valuation of the said county tax sale certificate lands are not taken into consideration. (Section 193.63, Florida Statutes, 1941, as amended.) When the said county tax sale certificates are purchased or redeemed the clerk of the circuit court is required to collect the said omitted taxes (see Section 193.71, Florida Statutes, 1941), based upon the valuation fixed by the assessor, or if no such valuation was fixed, then, upon the last valuation fixed by the assessor (section 194.10, Florida Statutes, 1941). The lien of county taxes attaches to "any property against which such taxes have been assessed" and continues in full force and effect until discharged by payment or otherwise (see section 192.21, Florida Statutes, 1941, as amended), and very probably dates back to the first of January of the tax year (see section 192.04, Florida Statutes, 1941).

Tax liens in this state are creatures of statute and have no constitutional recognition as such (*State v. Culbreath*, 140 Fla. 634, 192 So. 814), so that whatever lien holders of tax sale certificates and omitted taxes have, must be determined from the statutes. The tax lien in this state attaches to property against which "taxes have been assessed." There is a difference between assessing land and assessing the taxes (6 C. J. S. 1022); it seems that the taxes are assessed when the lands are charged with specific sums for taxes by the assessing officials. There is no provision in the taxing statutes of this state providing for the issuance of a tax deed upon county taxes except where tax sale certificates are presented to the clerk of the circuit court. The tax deed is based upon the tax sale certificate and not upon the delinquent taxes as such.

In the light of the foregoing statutes and authorities, I am of the opinion that omitted taxes, required to be purchased with county-owned tax sale certificates, attach themselves to the tax sales certificate and the lien thereof. This being true, where the tax sale certificate to which any omitted taxes may be attached is barred by limitations, I am of the opinion that such omitted taxes are also barred by the same limitation.

### EXCISE TAX ON DOCUMENTS

January 11, 1947.—047-5.

#### DOCUMENTARY STAMP TAX—STOCKHOLDERS' PROXIES

QUESTION: May documentary stamps, representing excise taxes under section 201.06, Florida Statutes, 1941, on proxies from corporate stockholders, be affixed to the minutes of the corporation or otherwise in lieu of being affixed to the separate proxies, when the proxies are very numerous?

*To Honorable C. M. Gay, State Comptroller:*

The tax in question is assessed against the person who makes, signs, executes or issues the proxy, or for whose benefit or use the same is made, signed, executed or issued (section 201.01, Florida Statutes, 1941), and appears to be for, and in respect to, the proxy itself or the paper upon which it is written (sections 201.01 and 201.06). Section 201.06 provides that "on proxies for voting at any election for officer or meeting for the transaction of business of any corporation . . . the tax shall be ten cents each." However, the said section does not expressly require that the stamp be attached to the proxy. The statutes expressly require that the stamps be attached to instruments to be recorded in public records (section 201.12)

and bills of sale of stock certificates (section 201.04); however, the stamps for stock certificates are to be placed in the stock book and not on the certificates (section 201.05). The comptroller is charged with the preparation and distribution of "suitable stamps denoting the tax on the documents to which the same are required to be affixed" (section 201.13). It is a misdemeanor for anyone to fraudulently cut, tear or remove any such stamp from any instrument upon which the tax is imposed by the stamp tax law (section 201.18). Although not expressly required by statute, there is a strong indication to be drawn from the statute itself that the stamps should be attached to the instrument taxed, except where otherwise expressly provided.

Proxies are for the benefit of stockholders, to enable them to vote at corporate meetings without being personally present, so that the stamp tax is payable by them and not by the corporations. Although the tax is against the stockholder, I see no legal objection to the corporation or any third person paying the same with the consent of the stockholder owing the tax. (See 49 Am. Jur. 213, section 20; 61 C. J. 1553, section 2291.)

One of the major merits of a stamp tax is to make the evidence of payment visible and almost automatic as to the instrument taxed (*Lee v. Bickell*, 294 U. S. 415, 54 S. Ct. 727, 78 L. Ed. 1337, text 1342). Unstamped proxies do not appear to be void under the Florida law (see 18 C. J. S. 1252, section 550); however, failure to pay the stamp tax is a misdemeanor (sections 201.06 and 201.17). Chapter 201 should be strictly construed and all doubts and ambiguities resolved in favor of the taxpayer (*Metropolis Publishing Co. v. Lee*, 126 Fla. 107, 170 So. 442). Although it is made a misdemeanor to make, sign or issue a proxy without "the full amount of the tax thereon being fully paid" (section 201.17), I find nothing which makes it a crime not to place a stamp upon the instrument, if it might be deemed possible to pay the stamp tax without placing the stamp on the same.

From the foregoing statutes and authorities, I am of the opinion that chapter 201 contemplates that documentary stamp taxes on proxies be evidenced by stamps attached to the proxies themselves; however, I find nothing in the statute making it a crime for failure to so attach the said stamps if the stamp taxes are actually paid upon the instrument, and the stamps are canceled, as required by law, so as to be of no further use. Only the failure to pay the stamp tax is a crime.

August 7, 1947.—047-241.

#### LEASE ON PROPERTY—DOCUMENTARY STAMPS—BASIS OF COMPUTATION

**QUESTION:** What is the proper formula for calculating the amount of documentary stamps required to be affixed to a lease of real property for a term of years?

*To Honorable Jess Mathas, Clerk, Circuit Court, DeLand, Florida:*

There have been two opinions of the supreme court of this state relating to documentary stamp taxes upon leases of real property for a term of years, in each of which the court held such leases subject to such taxes but upon a different basis. In the case of *Dundee Corporation v. Lee*, 156 Fla. 699, 24 So. 2d. 234, the court indicated that such a lease was taxable under section 201.08, Florida Statutes, 1941, as an obligation to pay money. In the case of *De Vore v. Lee*, ..... Fla. ...., 30 So. 2d. 924, the court receded from that holding and held such an instrument subject to taxation as an interest in lands under 201.02, Florida Statutes, 1941. In the *Dundee* case the court decided that the basis of taxation of such a lease was its present value, taking into account the value of money or rate of interest. The *De Vore* case has not yet reached the state of fixing the basis of taxation, as it was returned to the lower court without deciding this question.



Until a more definite basis is fixed by the supreme court of this state for determining the value of leases for documentary stamp tax purposes, it is suggested that the formula set up in the case of Dundee Corporation v. Lee be followed, which is to reduce the amount of the several instalments to be paid to its present value, taking into consideration the present value of money or the interest rate. In case a lease of considerable value has been presented it is further suggested that the matter of its value be taken up with the state comptroller's office.

August 9, 1948.—048-267.

#### DOCUMENTARY STAMPS—PAYMENT

**QUESTION:** An instrument styled "Deposit Receipt, Papco's Form R. E. 50," printed by the Papco Publishing Corporation, Miami, 32, Florida, is sometimes used in connection with the sale and purchase of real estate in the State of Florida. Is this instrument, when properly executed, subject to the provisions of chapter 201, Florida Statutes, 1941, and is it required to carry the usual documentary stamps, and, if so required, are such stamps payable by the vendor or the vendee.

*To Honorable C. M. Gay, State Comptroller:*

A similar contract to the one in question was construed by our supreme court in the case of Wolfe v. Daugherty, 137 So. 717, 718, and it was there held that such a contract is not an option, but the vendee might, under certain circumstances, obtain an equitable vendee's lien on the said land for the amount paid, or he may, at his election, bring an action at law to recover the amount paid. Section 201.02, Florida Statutes, 1941, does provide for the payment of an excise tax on deeds, instruments or writings, whereby any lands, tenements or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, but I do not think that under this contract such an interest is vested in the purchaser as under said law would warrant an excise tax on this instrument.

Inasmuch as this doubt exists regarding the liability of the instrument's taxation (Lee v. Quincy State Bank, 173 So. 909), it is my opinion that the same is not liable for the said excise tax.

October 21, 1947.—047-359.

#### TRANSFER OF STOCK SHARES—TAXATION OF TRANSFERS— NONRESIDENT OWNERS

**QUESTION:** Where outstanding shares of stock in a Florida corporation are sold and transferred in another state, from one nonresident to another, are such transfers subject to the Florida documentary stamp tax statutes, when such corporation maintains a transfer office and agent in another state where a record of such transfers are made instead of being made in this state?

*To Honorable C. M. Gay, State Comptroller:*

The corporation in question maintains in another state a stock transfer book in which its duly appointed transfer agent maintains a complete record of all transfers of stock in that and other states. This transfer agent furnishes to the home office of the corporation in Florida, by telegraph, a daily memorandum advising it of the various transfers of stock made upon such stock transfer book each day.

Section 201.01, Florida Statutes, 1941, provides that, "There shall be levied, collected and paid the taxes specified in this chapter, for and in respect to . . . certificates of stock . . . by any person, who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, or for

whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the State of Florida." Section 201.04, Florida Statutes, 1941, provides: "On all sales, agreements to sell, or memoranda of sales or deliveries of, transfers of legal title to shares, or certificates of stock or profits or interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefits of such stock interests rights or not, on each one hundred dollars of face value or fraction thereof the tax shall be ten cents; and where such shares are without par or face value, the tax shall be ten cents on the transfer or sale or agreement to sell on each share." Where the evidence of such transfers are shown only upon the books of the corporation, the stamps are to be placed upon such books, but where such transfers are evidenced by a transfer of the certificate, the stamps are to be placed upon the certificate, and where evidenced by some agreement, memorandum or other writing, the stamps are to be placed upon such evidence of transfer (section 201.04, Florida Statutes, 1941).

These provisions of the laws of this state seem to contemplate transfers of certificates of stock otherwise than by registration upon the books of the corporation. These provisions seem to be in accord with section 614.03, Cumulative Supplement to Florida Statutes, 1941, the same being a part of the uniform stock transfer law adopted in this state, which section in substance provides that certificates of corporate stock may be transferred by (1) delivery of the certificate properly endorsed, (2) delivery of the certificate with the assignment endorsed thereon, and (3) written assignments or transfers of the certificate. This latter section is applicable although the corporate charter or by-laws provide otherwise. The uniform stock transfer law has been adopted in about forty-five states. Section 612.18, Florida Statutes, 1941, which is prior in point of time to either of the foregoing statutes, provides that (a) the delivery of a certificate of stock, with proper assignment or transfer, is sufficient as a transfer of title against all but the corporation, other stockholders and creditors of the said corporation, (b) but to be valid as against such persons, except for certain stated purposes, the transfer must be registered upon the books of the corporation. Corporate stock in this state is personal property of the owner thereof.

Except where a statute, charter provision or by-law requires it, registration of transfers of corporate stocks on the corporate books is not generally necessary to vest the assignee with title to the stock assigned him (18 C. J. S. 1042, Section 434), and unless a particular method of transfer is prescribed by statute or the corporate charter or by-laws, an owner of stock may dispose of his share in such manner as would be sufficient to pass title to any other chose in action or intangible personal property (18 C. J. S. 927, Section 392). Several of the courts have declared that section 1 of the uniform stock transfer law (section 614.03, Cumulative Supplement to Florida Statutes, 1941), "simply carried into statute law the legal principle theretofore prevailing." (*Davis Laundry v. Whitmore*, 92 Ohio St. 44, 110 N. E. 518; see also *Meier v. Continental National Bank*, 83 Ind. App. 109, 143 N. E. 377; *Patterson v. Fitzpatrick-McElroy Company*, 247 Ill. App. 1). Where title to stock passes by delivery of an endorsed certificate, the situs of the same appears to be where the certificate is transferred or delivered (*Klein v. Wilson*, 7 Fed. 2d. 769; *Mills v. Jacobs*, 333 Pa. 231, 4 Atl. 2d. 152; *Houghney v. Houghney*, 305 Mich. 356, 9 N. W. 2d. 575; Annotation in 122 A. L. R. 366-370).

Although corporations of this state, organized pursuant to chapter 612, Florida Statutes, 1941, may hold stockholders' and directors' meetings in other states (sections 612.24 and 612.29, Florida Statutes, 1941), and have offices in other states (section 612.08, Florida Statutes, 1941),

I am of the opinion that their principal office must be in this state (see sections 612.03, 612.59 and 612.60, Florida Statutes, 1941). I find nothing in the statutes either authorizing or prohibiting the keeping of corporate books and records, including stock certificate and transfer records, in other states. The general rule seems to require that they be kept in the state where the principal office of the corporation is located (see 18 C. J. S. 611, section 191).

The fact that transfers of stock in a domestic corporation may be subject to a transfer tax in another state would not seem to prevent its taxation in this state if within the purview of the laws of this state (Tax Commission v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358). Transfers of certificates of stock, as described in section 201.04, Florida Statutes, 1941, are taxable in this state only when they are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the State of Florida (section 201.01, Florida Statutes, 1941). Under the present laws of this state it appears that certificates of stock are more than evidence of a right; they are constituents of title or items of personal property within themselves.

It, therefore, seems that transfers of certificates of stock by endorsement, by assignment or separate written instrument, when made in other states, are not subject to the foregoing stamp taxes; unless they are brought into this state for the purpose of transfer upon the records of the corporation or for the issuance of a new certificate or for some other purpose in connection with the transfer of such certificate. Where such transfers are made and completed in other states they are not within the purview of section 201.01, Florida Statutes, 1941. This seems to answer the question. Insofar as this opinion is in conflict with that of a former attorney general, which opinion appears in the 1931-1932 Biennial Report on page 843, the same is hereby overruled as it was rendered prior to the adoption of the uniform stock transfer act in this state.

August 20, 1947.—047-270.

#### STOCK TRANSFER—LEGAL TITLE TO SHARES— LIABILITY FOR TAX

**QUESTION:** When shares of stock are held by the customer of a regular stock broker and are registered in the name of the stock broker or of his nominee, and the customer decides to transfer his account from one broker to another, with no change of beneficial interest in such shares of stock—the corporation so requested transferring the shares of stock on the corporate stock records from the name of the nominee of the first broker to the name of a nominee of the second broker—would this transfer be subject to the stamp tax?

*To Honorable C. M. Gay, State Comptroller:*

I presume that the broker, in whose name the stock is registered on the corporate records, holds the legal title to the stock in question for the use and benefit of the customer and that such broker has no right, title or interest in the stock other than to sell and convey the same for the account of the customer. The equitable and beneficial title is in the customer; the only title held by the broker is a mere naked title with power of sale. The transfer of title from the name of one broker to another will not make any change in the equitable and beneficial title to the stock; it will remain in the same person until sold by the broker or turned back to the customer.

Under section 201.04, Florida Statutes, 1941, a documentary stamp tax is levied "on all sales, agreements to sell, or memoranda of sales or deliveries of, transfers of legal title to shares, or certificates of stock . . . in any corporation . . . whether made upon or shown by the books of the corporation . . . or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock interests rights or

not . . ." The tax is levied upon transfers of legal title to shares or certificates of stock whether entitling the holder in any manner to the benefit of such stock interests or rights or not. It was held by former attorneys general that transfer of stock from one trustee to another, without change of beneficiary, was subject to the tax (1933-4 Biennial Report 45), and that transfers from the name of one person to another, even though there is no transfer of the beneficial interest in the stock, were subject to the tax (1937-1938 Biennial Report page 505). (To the same effect see also 1931-1932 Biennial Report page 871.)

Under the facts set out in the foregoing question it seems that there would be a transfer of the legal title to the share of stock within the purview of section 201.04, Florida Statutes, 1941, sufficient to subject the transaction of said section. The question should be answered in the affirmative.

September 3, 1947.—047-303.

#### DOCUMENTARY STAMP TAX—LEASE—LIABILITY FOR PAYMENT

**QUESTIONS:** 1. What is the method of arriving at the amount of documentary stamp taxes upon a ninety-nine year lease of real property in this state?

2. What is the method of arriving at the amount of documentary stamp taxes upon a three-year lease of real property in this state?

3. Is the said documentary stamp taxes due and payable upon the execution of the lease in question or on the birthday of the lease after the rent has been earned?

4. Is the lessor or the lessee liable for the payment of documentary stamp taxes upon leases of real property in this state?

5. Does the inclusion in a lease of real property in this state, of an option to purchase or to terminate the lease, affect the amount of documentary stamp taxes to be assessed?

*To Honorable C. M. Gay, State Comptroller:*

There have been two opinions of the supreme court of this state relating to documentary stamp taxes upon leases of real property in this state for terms of years, in each of which the court held such leases subject to taxation but upon different bases. (*Dundee Corporation v. Lee*, 156 Fla. 699, 24 So. 2d. 234 and *De Vore v. Lee*, Fla. . . . , 30 So. 2d. Adv. 924.) The last expression of the said supreme court is that leases of real property in this state are taxable under section 201.02, Florida Statutes, 1941, as involving an interest in land. (*De Vore v. Lee*, supra.) Although the court, in the *De Vore* case, repudiated its holding in the *Dundee Corporation* case, that a lease of real property was an obligation to pay money, under section 201.08, Florida Statutes, 1941, and held it to be an interest in real property, under section 201.02, Florida Statutes, 1941, and taxable thereunder, it does not appear to have yet receded from its position that documentary stamp taxes upon leases of real property should be based upon the present value of the same and not upon some past or future value. The *De Vore* case has not yet reached the point of fixing the value of the lease for taxation purposes.

Under section 201.02, Florida Statutes, 1941, the tax upon leases, as the conveyance of an interest in real estate, "on each hundred dollars of the consideration therefor" is ten cents. Where a lease of real estate for a term is payable in instalments, what is the consideration therefor within the above statute? In the *Dundee Corporation* case the court said that the consideration for a lease of real estate, for documentary taxation, was the present value of the several instalments to be paid. Until a more definite basis for such taxation of leases is fixed by the supreme court it is suggested that the rule of reducing the consideration to be paid to its



present value and calculating the tax on that value be considered. This rule should be followed as to all leases, whether for a long or a short term.

Documentary stamp taxes in this state are levied against the maker of the instruments taxed (section 201.01, Florida Statutes, 1941), so that the documentary stamp taxes against leases of real estate—they being conveyances of an interest in real estate—is against the lessor of the real estate and not against the lessee. Although the undertaking of the lessee to pay the rental at specified periods is in the nature of an obligation to pay money, it is no more within the statute than was the contract under study in the case of *Metropolis Publishing Company v. Lee*, 126 Fla. 107, 170 So. 442 (see *De Vore v. Lee*, ..... Fla. ...., 30 So. 2d Adv. 924, text 926).

The documentary stamp taxes on leases are measured by "the consideration therefor" which consideration, when payable by instalments at specified periods in the future, is the present value of the several instalments to be paid. Although some leases of real estate contain options to purchase the property or to terminate the lease, such options appear to be too problematical for consideration and should not be taken as affecting the method of calculating the consideration for the lease for the purpose of documentary stamp taxation.

From the foregoing it seems that: (1) the stamp taxes upon long term leases are measured by the present value of the consideration agreed to be paid for the same; (2) the method of calculating the value of short term leases is the same as that to be used for long term leases; (3) documentary stamp taxes upon leases of real property in this state are due and payable when the lease is executed and ready for delivery; (4) the lessor and not the lessee is the one liable for documentary stamp taxes upon leases of real estate; and (5) the inclusion in a lease of an option to purchase the property leased or to cancel the lease does not affect the method of calculating the consideration to be paid for the lease.

June 11, 1947.—047-164.

#### FEDERAL LOANS—LIABILITY FOR TAX

**QUESTION:** In the light of the *Plymouth* case, is a note secured by mortgage given by an individual to the Reconstruction Finance Corporation subject to the excise tax on documents under chapter 201, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

The case referred to in the question is *Plymouth Citrus Growers Ass'n. v. Lee*, Comptroller, 27 So. (2d) 415. In this case the association executed a form note and mailed it to the Columbia Bank of Cooperatives of Columbia, South Carolina, an instrumentality of the United States, organized under the Farm Credit Act of 1933 (12 USCA §1131 et seq.). The association placed the requisite amount of state documentary stamps on the note as provided by said chapter and then filed a claim for refund which was denied on the theory that the note was required to bear such stamps. One of the contentions made by the association was that the note became the property of an instrumentality of the United States before it was subject to the tax and was exempt under the federal constitution and the provisions of said Farm Credit Act (12 USCA §1138). As to this contention, the Supreme Court of Florida said:

"We are convinced that the factors tending the note bring it within the class taxable under Chapter 201, Florida Statutes, 1941, F.S.A. It is perfectly evident that if the Farm Credit Act inhibited the State from imposing the tax, it could not be done, but we have examined the terms of this act, and nowhere is it provided, in word or by fair implication, that notes executed by persons dealing with Federal banks, cooperatives, or associations

shall be exempt from Federal, State, or other documentary taxes. It is hardly necessary to say that, so long as the Federal Law does not forbid such a tax, the State may exercise the privilege to impose it."

It will be noted that the supreme court found that the Farm Credit Act did not prohibit the state from imposing the tax but recognized that if the federal law did forbid such a tax the state may not exercise the privilege to impose it. In this connection it should be remembered that the final decision on questions such as that put by you lies with the Supreme Court of the United States and, therefore, we must look to that court for further guidance in answering the question.

The pertinent part of the Reconstruction Finance Corporation Act as amended June 10, 1941, by 55 Stat. 248 (15 USCA §610), after designating certain exemptions from state taxation provides that:

"Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction Finance Corporation . . ."

The Supreme Court of the United States has never construed the meaning of the words in the last mentioned section in relation to the question under consideration but it has construed a similar provision in the Home Owners' Loan Act of 1933, said provision being in 12 USCA Section 1463(c) and reading as follows:

"The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by . . . any State. . . . The corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; . . ."

In *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 84 L. Ed. 11, the Supreme Court of the United States held that the last quoted provision embraced and prohibited the imposition of a tax of the State of Maryland on the privilege of recording a mortgage executed to the Home Owners' Loan Corporation and said with respect to said quoted provision:

"The critical term, in the present relation, is 'loans'. We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security. The Home Owners' Loan Act requires that the loans made by the Corporation 'shall be secured by a duly recorded home mortgage.' Both the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress. We agree with the state court that there is no sound distinction which makes inapplicable the reasoning which was decisive in the *Crosland Case*."

It is true that in the *Pittman* case the mortgage was offered for record by the corporation and the tax was demanded of the corporation but the court in referring to the *Crosland* case (*Federal Land Bank v. Crosland*, 261 U.S. 374, 67 L. Ed. 703) observed that in that case a provision for the payment of tax by the lender was regarded as having no determining significance for "whoever pays it, it is a tax upon the mortgage and that is what is forbidden by the law of the United States."

Based upon the foregoing, it is my conclusion that a note secured by a mortgage given by an individual to the Reconstruction Finance Corporation is not subject to the excise tax on documents under chapter 201, *supra*, and that, therefore, the question is properly answered in the negative.

April 17, 1947.—047-111.

#### MORTGAGE ASSIGNMENT PROCEEDS—LIABILITY

**QUESTION:** Are written assignments of the proceeds to be received by the assignors of mortgages, under written assignments of their mortgages, subject to our documentary stamp tax laws?

*To Honorable C. M. Gay, State Comptroller:*

It appears from the request, and the papers, and documents exhibited with said request, that mortgage loans are made in this state by mortgage loan correspondents of insurance companies of other states. These loans are secured by mortgages encumbering real property in this state and are made to the mortgage loan correspondents as mortgages. The usual procedure followed in making these loans seems to be that after the agents of the insurance company have agreed to the making of the loan, a mortgage is executed to the loan correspondent who executes an assignment of such mortgage to the insurance company; under the usual procedure it takes about fifteen days for the insurance company to provide for the payment of the proceeds for the assignment and transmit the same to the loan correspondent. Usually the loan correspondent arranges with the local bank to advance to it a sum equal to the amount to be received by it from the insurance company and makes an assignment, of its right to the proceeds from the insurance company, to the bank. The consideration for the assignment of the mortgage is paid to the bank by the insurance company pursuant to the aforesaid assignment of proceeds.

The assignment does not seem to be within the purview of sections 201.02 to 201.07, inclusive, Florida Statutes, 1941. It is not a promissory note, nonnegotiable note nor written obligation to pay money within section 201.08; however, said section 201.08 also extends to "assignment of salaries, wages and other compensation." The instrument in question is not an assignment of either wages or salaries. This brings up the construction of the words "other compensation" quoted from section 201.08. For an instrument to be taxable under the documentary stamp tax law it must be clearly within the terms of such law. (*Metropolis Publishing Co. v. Lee*, 126 Fla. 107, 170 So. 442.) In this case the court seems to have applied the rule of *ejusdem generis* to the first part of the section relating to "promissory notes, nonnegotiable notes (and) written obligations to pay money" holding that the reference to notes limited the reference to written obligations. If we should apply the same rule to the remainder of the sentence, to wit, "assignment of salaries, wages and other compensation . . .," it is at least very uncertain that assignments such as the one in question are within the statute. The court may have deviated from this rule to some extent in *Dundee Corporation v. Lee*, 156 Fla. 699, 24 So. (2d) 234, but appears to have gone back to the same rule in the *De Vore v. Lee* case, not yet reported.

I am, therefore, of the opinion that the assignment in question is not within the statute and that the question should be answered in the negative.

July 11, 1947.—047-191.

#### RELIGIOUS GROUPS—EXEMPTION FROM TAX

**QUESTION:** Is a promissory note, secured by mortgage or otherwise, executed by a religious organization, exempt from documentary stamp tax law?

*To Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:*

Documentary stamp taxes are assessable under the provisions of chapter 201, Florida Statutes, 1941, which chapter contains no provision exempting religious organizations from the operation of such law.

Excise taxes are not within the exemption contemplated by section 1, article 9, and section 16, article 16, of the Florida Constitution. (*Orange State Oil Company v. Amos*, 100 Fla. 884, 130 So. 707; *West Palm Beach v. Amos*, 100 Fla. 891, 137, 710; *City of Lakeland v. Amos*, 106 Fla. 873, 143 So. 744.)

It, therefore, appears that neither the statute nor the constitution provides exemption from documentary stamp taxes on promissory notes executed by religious organizations.

The question must, therefore, be answered in the negative.

November 18, 1948.—048-345.

#### DOCUMENTARY STAMP TAXES—COOPERATIVE APARTMENT LEASES

**QUESTION:** Where a proprietary lease of a cooperative apartment building, located in this state, requires that persons leasing apartments in such building purchase a sum certain in the corporate stock of the owning corporation and pay annual sums, the amounts of which must be determined annually during the life of the said lease, are such leases subject to taxation under the documentary stamp tax laws of this state?

*To Honorable C. M. Gay, State Comptroller:*

I gather from the file, exhibited with the request for opinion, that the title to the apartment building is vested in a corporation whose stock has been divided into groups, each group being allocated to an apartment in the said building. The size and desirability of each apartment evidently determines the amount of corporate stock allocated to it. Any person leasing an apartment in the building must, as a condition precedent to obtaining the lease, purchase the corporate stock allocated to the apartment to be leased. In addition to purchasing the corporate stock allocated to the apartment the lessee must pay such annual assessments as may be fixed by the governing board of the corporation. Evidently, this amount is determined from estimated operating expenses and maintenance of the building and apartments; probably including heat, water, power, taxes, insurance, maintenance and similar expenses.

There seems to be no way of determining the amounts of the annual assessments provided for by the leases, until the assessment therefor is made, and it seems evident that these amounts will vary from year to year, so that they cannot be foretold. It seems evident that the amount of stock allocated to each apartment, which the lessee is required to purchase in connection with obtaining the lease, very probably represents the capital investment chargeable to such apartment, and that the annual assessments represent the apartment's ratio of the annual operating expenses. In the light of the cases of *Lee V. Kenan*, 5th CCA, 78 F. 2d. 425; *Metropolis Publishing Company v. Lee*, 126 Fla. 107, 170 So. 442; *United States v. Isham*, 17 Wall, 496, 21 L. Ed. 728; *City of Philadelphia v. Goldfine*, 151 Pa. S. 59, 29 Atl. 2d. 233, and short annotation in 100 A. L. R. 871, it seems that the provisions of the said lease are not within the purview of the documentary stamp tax law insofar as they relate to the annual payments, which payments are not possible of present determination.

Insofar as the said lease agreement provides for and requires the purchase of a definite amount of stock in the owner corporation, without the purchase of which no lease may be made, it would seem that the purchase of the said stock is a part of the consideration for the lease, although the sum to be paid is consideration for the said stock. The terms of the lease have the effect of obligating the lessee to purchase a sum certain in corporate stock. This, I think, may be construed as an obligation to pay money in the amount of the stock allocated to the leased apartment.



I am, therefore, of the opinion that the lease in question may be taxed to the extent that it contains a present obligation to pay a sum or sums certain in money, that is to purchase corporate stock; but insofar as it contains promises to pay moneys, the sums of which may not be determined at this time, and may only be determined in the future, it is not subject to such taxes.

The tax upon the lease as set out will not relieve the payment of the stamp tax on the stock.

### EXCISE TAXES GENERALLY

February 10, 1947.—047-41.

#### CITRUS EXCISE TAXES—ENFORCEMENT FOR NON-PROFIT

QUESTION: Are the provisions of section 205.10, Florida Statutes, 1941, available to the Florida Citrus Commission for the purpose of enforcing the collection of due and unpaid excise citrus taxes?

*To Mr. W. P. Allen, Attorney for the Florida Citrus Commission, Bartow, Florida:*

I have heretofore held that section 205.10 is authoritative for the collection by warrant of all license or privilege taxes which may have become delinquent through nonpayment, including excise taxes. This section of the statute has been invoked in the collection of documentary stamp taxes imposed upon instruments in writing under the provisions of chapter 201, Florida Statutes, 1941, and the tax upon citrus fruit to which reference is made, is of like application.

While it is true that chapter 599, Florida Statutes, 1941, provides for the excise citrus tax to be paid to the commission and although section 205.10 provides for the issuance of the warrant by "the tax collector, comptroller, state treasurer or other official to whom the tax is payable," there is nevertheless serious doubt in my mind as to the authority of the Florida Citrus Commission to issue the warrant. The comptroller is designated by the statute as the ultimate depository of the collected excise citrus taxes and I am of the opinion that he is the official authorized under section 205.10, *supra*, to issue the warrant.

My suggestion is that in cases where this tax becomes delinquent, the commission should certify to the comptroller the fact that the tax is due and unpaid, whereupon he is authorized to issue his warrant for the collection thereof. This is the procedure followed in cases where failure to pay documentary stamp taxes occurs and which has been effective in the collection of such taxes.

### TANGIBLE & INTANGIBLE PERSONAL PROPERTY TAXATION

May 27, 1947.—047-165.

#### TIME FOR ASSESSMENT—EFFECT OF LAWS

QUESTION: Certain personal property was placed on the personal property tax roll of Polk county for the year 1946, property which came into this county after January 1, 1946, but prior to March 1, 1946. Is such property taxable, since it was not in the county on January 1, 1946? In other words, should section 200.13 Florida Statutes, 1941, be followed, or section 193.11, Florida Statutes, 1941?

*To Honorable John B. White, Tax Assessor, Polk County, Bartow, Florida:*

Section 193.11 is section 2 of chapter 20722, Laws of Florida, 1941, and this law was approved by the governor on June 7, 1941, and filed in the office of the secretary of state on June 9, 1941, and section 200.13 is section 12 of chapter 20723, Laws of 1941. This was also approved by the governor on June 7, 1941, and filed in the office of the secretary of state on June 9, 1941, and both chapters 20722 and 20723 took effect upon becoming a law.

Chapter 20722, in effect, amended what was then the law. Chapter 20723 was a new law and did not seek to amend any existing law.

Chapter 20722 is general in its terms in that it covers all real and personal property. Chapter 20723 is limited in its effect in that it covers "taxable personal property" which is defined as: "all goods, chattels, boats, vessels, vehicles (except motor vehicles), animals and other articles of value capable of manual possession and whose chief value consists of the thing itself and not what it represents."

Section 2 of said chapter 20722 (section 193.11, Florida Statutes, 1941) says:

"Between the first day of January and the first day of June in each year, the county assessor of taxes in each county with the aid of such assistant assessor of taxes as may be appointed by the county assessor of taxes, shall ascertain by diligent inquiry the names of all taxable persons in his county, and also all of their taxable personal property, and all taxable real estate therein, on the first day of January of such year, and shall make out an assessment roll of all such taxable property."

Section 12 of chapter 20723 (section 200.13, Florida Statutes, 1941) says:

"No tax return shall be received by the tax assessor after April first of any year for that tax year. Beginning on April first of each year the tax assessor shall begin preparation of his tax roll of tangible personal property, and shall cause the same to be completely assessed at its true and just taxable value according to his best information and judgment, and shall complete the same on or before June first of that year. The tax assessor shall enter upon and include in said tax roll the name of each and every person, firm and corporation who or which between January first and March first of that year was an inhabitant and/or was doing business in such county, and shall enter upon said tax roll, according to his best knowledge and information, the name of each person, firm or corporation not an inhabitant of the county or not doing business therein who or which between said dates of that year had located in the county tangible personal property, and shall also enter upon said roll all taxable tangible personal property usually kept and located in the county, the ownership of which is unknown to him, provided in the last mentioned case the tax assessor shall give the location of said property if same is known to him."

These sections must be construed together and when so construed, in my opinion, if the property which is to be assessed is what is known as "Tangible Personal Property," as defined in said chapter 20723, then it shall be assessed as provided in section 12 of said chapter (section 200.13, Florida Statutes, 1941), and the assessment should be made pursuant thereto.

If the property is taxable property but does not come under the definition of tangible personal property, as defined, then said chapter 20722 (section 193.11, Florida Statutes, 1941) would govern.

July 22, 1948.—048-243.

### INTANGIBLE TAX—CONDITIONAL SALES CONTRACTS ASSIGNED BANKS

**QUESTION:** Where a retailer in this state sells merchandise on conditional sale, taking conditional sales contracts as evidence thereof, which contracts are assigned for a valuable consideration to banks within or without this state, are such conditional sales contracts subject to taxation under the intangible personal property taxing laws of this state?

*To Honorable C. M. Gay, State Comptroller:*

Under the plan of operation the dealer, upon completion of a conditional sale of merchandise and the execution and delivery of the conditional sales contract for a valuable consideration assigns such contract to some bank within or without this state. It is stipulated, by and between the dealer and the purchasing bank, that the assignment vests in the bank the dealer's "entire right, title and interest in and to the contract referred to" and the said dealer's "entire right, title and interest in the merchandise sold" under the said conditional sales contract. Under the operating agreement between the dealer and the purchasing bank the contracts in question, although assigned to the bank as above, are apparently usually kept at the dealer's place of business "or at such other locations as may be mutually agreed upon" together with such books of account and records as may be desired or designated by the purchasing bank. Under the agreement between the dealer and the purchasing bank all contracts may be actually and physically delivered to the said bank. Unless and until actually and physically delivered to the bank the dealer apparently acts as agent for the bank in making collections and in keeping necessary records in connection therewith. In case of default on any such contract for a period of six months such defaulted contract is actually or in effect reassigned to and becomes the property of the dealer so long as it may remain in default.

Under the foregoing statement of facts, I am of the opinion that the said assignment not only vested title to the indebtedness in the bank but also vested in it title to the property retained by the dealer. (See Annotation in 13 A.L.R. 1050; 55 A.L.R. 1161; 65 A.L.R. 783.) The assignment gives the bank the legal status of the dealer (*Bear v. General Motors Acceptance Corporation*, 101 Fla. 913, 132 So. 817, text 821).

I find nothing in the file handed this office with the request for opinion that in any way indicates that the assignment was in the nature of a mortgage or lien merely and only for the purpose of securing the payment of money loaned or advanced by the bank to the dealers. After a careful examination of the file furnished by you I must hold that the bank after assignment as aforesaid is the owner and holder of the contracts and retained titles in question.

Having determined that the contracts in question and retained titles are vested in the banks and not in the dealer, I am confronted with the question of whether or not such property is subject to taxation in the hands of the banks to which assigned, whether within or without this state. Under the provision of section 192.54, Cumulative Supplement to Florida Statutes, 1941 "all banks, trust companies and Morris Plan Banks, now or hereafter chartered under the laws of the State of Florida, shall have the same immunity from state and local taxation that national banking associations have from time to time under the statutes of the United States." States and their political subdivisions are without power to tax the personal property of national banking associations. (See opinions of this office reported in 1945-1946 Biennial Report, 290 and 294, and authorities therein referred to.) The conditional sales contracts in question are intangible personal property. These observations seem to answer the aforementioned question in the negative insofar as the contracts in question are held by

national banking associations and banks chartered under the laws of the State of Florida.

Should any such contracts be assigned to banks chartered under the laws of other states they would not appear to be within the letter of said section 192.54, Cumulative Supplement to Florida Statutes, 1941, which being an exemption statute, should be strictly construed in behalf of the state and against the taxpayer. (*State v. Doss*, 146 Fla. 752, 2 So. 2d. 303.)

Where conditional sales contracts have acquired a business status in this state, although owned and held by banks chartered under the laws of other states, they would seem to be subject to our intangible personal property taxing laws. As to this class of said contracts the question should be answered in the affirmative. This opinion is based upon the applicable statutes.

Possible constitutional questions as to the validity of any of the statutes construed have not been considered.

February 18, 1948.—048-60.

#### REAL ESTATE CONTRACTS—CLASSIFICATION OF CONTRACTS

**QUESTION:** Are contracts for the sale and conveyance of real property subject to taxation in this state, as intangible personal property of the vendor, and if so should they be classified as class "C" or class "D" intangible personal property?

*To Honorable C. M. Gay, State Comptroller:*

Class "C" intangible personal property is defined as notes, bonds and other obligations secured by mortgage, deed of trust, or other lien upon real property situated in Florida (section 199.02, Florida Statutes, 1941, as amended). Every person who takes, receives or records "any mortgage, deed of trust or other written specific lien in the nature of a mortgage upon real property situated in Florida" is required to pay the tax upon class "C" intangible personal property. (Section 199.11, Florida Statutes, 1941, as amended.) Intangible personal property not within classes "A" "B" or "C" is classified as class "D" intangible personal property. This seems to lead to the question of whether or not contracts for the sale and conveyance of real property are liens upon real property within the purview of sections 199.02 and 199.11, Florida Statutes, 1941, as amended.

The copy of the contract for the sale of real property furnished with the request for opinion seems to be in the usual form for such contracts. The vendor agrees to convey the premises upon the vendee complying with his obligations under the contract; the vendee agrees to make certain payments and to do certain other stipulated things. Under the contract the legal title to the premises remains in the vendor until the vendee carries out the matters and things required of him under the contract, at which time the vendor agrees to convey the same. Under the terms of the contract the vendor, upon default by the vendee, may declare a forfeiture and retain all payments made as compensation for the use and occupancy of the premises. He is given the right of re-entry upon default. The contract contains no express lien of any kind.

Where a contract for the conveyance of real property has been entered into, with the legal title remaining in the vendor, and the vendee going into possession; in law the vendor, until the actual conveyance of the property, holds the said legal title as security for the purchase price of the premises. (*McKinnon v. Johnson*, 54 Fla. 538, 45 So. 451, text 453.) Equity considers that the vendee holds an equitable title to the property and that the vendor holds the legal title in the nature of a trust to be conveyed upon full performance of the contract by the vendee. Pomeroy says that to call the vendor's "complete legal title a lien, is certainly a misnomer. In case of a conveyance, the grantor has a lien, but no title. In case of a contract for



sale before conveyance, the vendor has the legal title, and has no need for any lien." (4 Pomeroy's Equity Jurisdiction 766, section 1260.) The author of 66 C. J. 1218, section 1080, states that the so-called lien of a vendor who retains title under an executory contract of sale is technically neither a vendor's nor an implied lien; the term lien has been said to be a misnomer, for the vendor has no lien in the sense that he has any direct claim aside from his legal title and his remedy in that connection, although this interest is usually designated as a lien. In fact, the position of a vendor before conveyance is defined and determined by the doctrine of equitable conversion, rather than by that of an equitable lien. (4 Pomeroy's Equity Jurisprudence 769, section 1261.) A vendor's lien is not the result of any agreement between vendor and vendee but is simply an equity raised by the courts for the benefit of the vendor. (*McKeown v. Collins*, 38 Fla. 276, 21 So. 103, text 106.)

The statutes relate to "any mortgage, deed of trust, or other lien upon real property" (section 199.02, Florida Statutes, 1941, as amended). In the construction of statutes, where doubt exists as to their meaning, "general words following specific words in an enumeration . . . are construed to embrace only objects of a similar nature to those objects enumerated by the preceding specific words." (2 Sutherland, Statutory Construction 395, section 4909.) If this rule be applied in the instant case there is doubt that an equitable lien is similar in nature to a mortgage or deed of trust.

Taxing laws are usually strictly construed in favor of the taxpayer and against the taxing power. (*Lee v. Wood*, 126 Fla. 104, 170 So. 433; *Cunningham v. Stefanidi*, 144 Fla. 214, 197 So. 722.)

When sections 199.02 and 199.11, Florida Statutes, 1941, as amended, are construed in connection with the foregoing rules and observations, I am of the opinion that contracts for the sale of real property, containing no express lien of any nature, should be construed as class "D" intangible personal property and not as class "C."

I return herewith the file furnished me with request for opinion.

April 16, 1948.—048-128.

#### FOREIGN CORPORATION—INTANGIBLE PROPERTY—TAX SITUS

**QUESTION:** Are accounts receivable, owned and kept at the home office of a foreign corporation duly qualified to do business in this state, for merchandise purchased by persons in this state from said foreign corporation, subject to intangible personal property tax?

*To Honorable C. M. Gay, State Comptroller:*

Intangible personal property, in contemplation of the intangible personal property taxing laws of this state, is taxable at the domicile of its owner, unless it has, by use or otherwise, acquired a business situs for taxation purposes at another place (*Wood v. Ford*, 148 Fla. 66, 3 So. 2d. 490, text 495). In order to authorize application of the "business situs rule," in regard to taxing intangibles, the physical evidence of such property need not be located in the business situs state (*Southern Pacific Company v. McColgan*, 68 Cal. App. 2d. 48, 156 P. 2d. 81, text 94 and 95).

It appears, from an examination of the comptroller's file in connection with this question, that the place of business in question in this state is maintained as an order-filling warehouse, without authority to extend credit or accept orders for merchandise to be sold on credit. It keeps no records of accounts, makes no collections of accounts, and has no control over the proceeds of any accounts collected. There is no indication that when collected such accounts become an asset of the business in this state. Such business is not operated independent of the home office. It seems that the usual plan of business, followed by the corporation in question, is to send salesmen out who take orders, for merchandise, which orders are sent to

the home office in another state where they are either accepted or rejected. If accepted, the merchandise is usually shipped from the warehouse in this state.

"Business situs" has been defined as arising where possession and control of property rights have been localized in some independent business or investment, away from the owner's domicile so that its substantial use and value primarily attach to and become an asset of the outside business (State v. Atlantic Oil Producing Company, 174 Okla. 61, 49 P. 2d. 534, text 538; Grives v. State, 168 Okla. 642, 35 P. 2d. 454, text 456; and other cases cited in 5 Words and Phrases 1046 et seq.). "Business situs" of credits, for tax purposes, carries with it the idea of permanency of location of credits and the purpose to incorporate them, when collected, into the local business (Gulley v. C. I. T. Corporation, 168 Miss. 268, 150 So. 367, text 369; Tax Commission v. Kelly-Springfield Tire Company, 38 Ohio App. 109, 175 N. E. 700, text 704).

If the foregoing facts (which were gleaned from the files of the state comptroller) are correct, then, when the applicable laws are considered in connection therewith, it seems that the question must be answered in the negative. The tax assessor is the judge of such facts and should pass upon them in considering the taxability or non-taxability of such property.

June 26, 1947.—047-184.

#### ANNUITY CONTRACT—TAXATION—BENEFICIARY

QUESTION: Are the rights of the beneficiary in the periodical payments made under the two contracts herein mentioned subject to assessment as intangible personal property?

*To Honorable C. M. Gay, State Comptroller:*

From the attachments to letter of April 17, including what appear to be excerpts from said two contracts, it seems that A was the insured under an annuity policy with X, a nationally known insurance company, and was also the insured under a so-called "Interest Income" policy with Y, another nationally known insurance company, and that B was designated as the beneficiary in both policies; that upon the death of A, B surrendered both policies to X and Y, which companies each issued a contract to B; that such contract with X reveals that its provisions are "in accordance with the mode of settlement elected under" the annuity policy of A; that such contract with Y discloses that its provisions are "Pursuant to the terms of the 'interest income' agreement heretofore entered into in relation to" the policy upon the life of A "and in lieu of the payment as provided in said Policy of the amount due thereunder;" that said contracts between B and X and Y provide for periodical payments of minimum fixed percentages of the principal of said contracts, to be paid absolutely and without contingency to B during the life of B and that upon the death of the latter the principal of the contracts and certain defined accrued interest shall be payable to the children of B, or if no children shall survive B, then to the executors or administrators of B; that the interest payment provided for in the contract between B and X "shall be increased by participation of this contract in excess interest over three per cent a year at such rate as the company may determine for each year" while the contract between B and Y provides that Y will pay "interest earnings" on the principal "monthly from the date hereof at such rate and shall from time to time be determined and thereto appropriated by the company but at a rate not less than 3% per annum."

In view of the fact that the request for opinion does not concern a general proposition of law but rather pertains specifically to the two contracts aforementioned, I felt it inexpedient to undertake to answer the question without having before me all of the aforesaid policies and contracts for examination, this conclusion being prompted by the possibility

that the payments made to B under one or the other or both of said contracts might be considered as income and therefore exempt from taxation under the Florida Constitution. Accordingly, on June 13, you were asked to obtain such policies and contracts. As a consequence you transmitted to me on June 23, a letter dated June 18, addressed to your office by the accountant for B, in which he says that he is unable to obtain the original policies held by A and asserts that the aforesaid excerpts are the supplementary contracts issued to B upon the death of A.

The same accountant, in a letter addressed to your office under date of April 12, appears to have taken the position that the periodical payments made to B under the contracts with X and Y are not subject to tax because of an alleged ruling by this office purportedly contained in my opinion of October 9, 1945 (1945-1946 Biennial Report 327). That part of said opinion referred to by such accountant was limited to the factual situation reflected thereby and since the facts there differ entirely from those involved herein the reference naturally would not be decisive as to the question propounded by you as stated, *supra*. However, said opinion of October 9, 1945, does contain a ruling (unknown to or overlooked by such accountant), which has some bearing on the matter under consideration and that ruling relates to whether, in the light of the decision of the Supreme Court of Florida in *Owen v. Fosdick*, 153 Fla. 17, 12 So. (2d) 700 "annuity contracts providing for periodical payments during the life of the annuitant (are) subject to taxation as intangible personal property in this state?" In response to the latter inquiry I did state in such opinion as follows:

"By an opinion of this office, under date of September 14, 1942 (1941-1942 Biennial Report, page 204), it was held that annuity contracts are subject to taxation under the intangible tax laws of this state, under class "D." This opinion I now confirm. (See also 1933-1934 Biennial Report 59)."

I now reaffirm what is last quoted as a general proposition of law but again must assert that I am not in a position to answer the question involved here without the aforesaid policies and contracts. Under the circumstances it is my advice that the rights of B in said periodical payments should be assessed for taxation as intangible personal property and the burden should be cast upon B to come forward and prove any claim for exemption.

March 22, 1948.—048-106.

#### ANNUITY—EXEMPTION

**QUESTION:** Where a citizen, a resident of another state, makes a gift to an educational institution in another state, conditioned upon the payment of an annuity by the donee institution to the donor so long as he may live or for a time certain, and subsequently to the making of such donation the donor moves his citizenship and residence to this state, is the value of the annuity subject to taxation in this state as intangible personal property of the donor?

*To Honorable C. M. Gay, State Comptroller:*

Under the laws of this state only "intangible personal property belonging to the State of Florida, or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation." (Section 199.02, Florida Statutes, 1941, as amended.) An annuity belonging to an individual is clearly not within the purview of this exemption.

The opinion of this office under date of May 30, 1947 (047-155), was upon the question of the taxation of the funds donated while in the hands of an educational institution but subject to an annuity contract such as the one aforementioned, and not upon the question of the taxation of the annuity. Such opinion is not in point here.

"Annuity" is a term somewhat loosely used in financial and legal nomenclature and is perhaps incapable of exact definition. Generally speaking, it designates a right to receive fixed, periodical payments, either for life or a number of years. Its determining characteristic is that the annuitant has an interest only in the payments themselves and not in any principal fund or source from which they may be derived. (*Commonwealth v. Beisel*, ..... Pa. ...., 13 A. 2d. 419, 128 A. L. R. 978, text 979.) I presume that in the present case the donor parted with title to the property donated so that the payments to him do not represent a return to him on his own property; or the payment by a debtor of an indebtedness to his creditor in instalments. I assume that the payments are annuities within the foregoing definition. This being true, it seems that the annuity in question would not be within the exemptions contained in section 199.02, Florida Statutes, 1941, and therefore subject to taxation in this state as intangible personal property, notwithstanding the fact that the funds donated, in connection with which the annuity arises, may have been donated to a tax-exempt educational association and therefore exempt from taxation. (See *Board of Commissioners v. Sand Spring Home*, 185 Okla. 305, 92 P. 2d. 376, text 380 and 381, and cases therein referred to.)

In the light of the foregoing observations it seems that the question should be answered in the affirmative.

December 29, 1947.—047-438.

#### ESTATE PROPERTY—TAXATION OF ESTATE—INTANGIBLE PERSONAL PROPERTY

**QUESTION:** Where a citizen and resident of this state dies testate, and probate proceedings are had upon her estate, in the county of her residence at the time of her death, and an executor is duly appointed to take charge of her personal estate, is the intangible personal property of the estate subject to taxation in this state, although moved out of the state by the sole devisee or heir of the decedent?

*To Honorable C. M. Gay, State Comptroller:*

I judge from an examination of the comptroller's files in this matter that the executor and the sole devisee or heir of the decedent reside in another state, and that the intangible personal property in question has been removed from the state. In the case of *State v. Beardsley*, 77 Fla. 803, 82 So. 794, text 796, the court stated that "the weight of authority is that such property (intangible personal property), in the hands of an administrator or executor, is taxable at the domicile of the decedent or place of granting of letters of administration, which is usually the place of the domicile of the decedent." By opinion dated January 5, 1934, a former attorney general of this state held that where an administrator or executor resides in another state and "removes his intangible personal property to his place of residence, such property will nevertheless be subject to taxation in the county in Florida where he was appointed." (1933-1934 Biennial Report, page 57.) In this connection see also 61 C. J. 239, section 224 and 51 Am. Jur. 491, section 483.

In the light of the foregoing authorities, I am of the opinion that the question should be answered in the affirmative. Only the property remaining in the hands of, or legally chargeable to, the personal representative should be taxed. Any portion of the assets of the estate legally distributed to the heirs or devisees would no longer be a part of the estate.

December 10, 1947.—047-426.

#### PLEASURE BOAT—TAXATION ON YACHTS

**QUESTION:** When a pleasure yacht or boat, owned by a nonresident of this state, is enrolled, registered or licensed in another state which levies



and collects no taxes upon yachts and boats, but remains in this state permanently (being stored in a local boat yard when not in use), is such yacht or boat subject to taxation in this state as tangible personal property?

*To Honorable C. M. Gay, State Comptroller:*

The answer to this question seems to depend upon the construction of section 200.44, Florida Statutes, 1941, which provides tax exemption to pleasure yachts and boats of nonresidents, which remain in Florida waters the year around, when enrolled, registered or licensed at ports in other states and countries when "the nonresident owner of such pleasure yacht or boats . . . shall show that taxes on said yacht or boat have been paid . . . in the state or country of residence, or that the same is not subject to such taxation therein." This section seems to require one of two things of the owner to entitle the yacht or boat to the exemption from taxation provided by the section; he must either show that he has paid taxes on the yacht or boat in the state or country of residence or that such yacht or boat is not subject to taxation therein. This construction of the section is also in accord with the intention of the Legislature as expressed in the preamble to the original act from which the section was taken. The question should be answered in the negative.

Evidence of taxation and payment thereof in the home state, or that under the laws of the home state such yacht or boat is not subject to taxation, should be made before the tax assessor so that he may be fully advised as to the right of the yacht or boat to exemption.

December 17, 1947.—047-421.

#### GATOR BOWL CERTIFICATES—INCOME CERTIFICATES

**QUESTION:** Are the Gator Bowl revenue certificates, issued by the City of Jacksonville, pursuant to chapter 21318, Laws of Florida, acts of 1941, as amended by chapter 24608, Laws of Florida, acts of 1947, subject to taxation under the intangible tax laws of this state?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 21318, Laws of Florida, acts of 1941, as amended by chapter 24608, Laws of Florida, acts of 1947, authorized the issuance of the said revenue certificates. I presume that the said revenue certificates were issued pursuant to a municipal ordinance providing "that only the revenues of the particular utility, department or facility . . . shall be pledged for the payment of said certificates of indebtedness or revenue certificates." (Section 1, chapter 21318, acts 1941.) These certificates were evidently issued without submitting the question of their issuance to a referendum of the people of the municipality. (See section 2, chapter 21318, acts of 1941, as amended by section 1, chapter 24608, acts of 1947.) Under the said acts the City of Jacksonville "is hereby authorized to issue and sell" the certificates in question (chapters 21318 and 24608, acts of 1941 and 1947).

The revenue certificates in question, being payable from a particular fund (the revenue from the Gator Bowl in Jacksonville, Florida), are not negotiable (7 Am. Jur. 853, Section 117; Annotation 42 A. L. R. 1027; 10 C. J. S. 532-533, Section 86; 11 C. J. S. 435-436, Section 64). The revenue certificates are not "secured by mortgage, deed of trust or other lien upon real property situated in Florida," being merely obligations binding the income from the Gator Bowl and not the said Gator Bowl as real property, and therefore not within the purview of subsection (3) of section 199.02, Florida Statutes, 1941, as amended. They do not appear to be within the purview of subsection (1) of said section. They might come within the purview of either subsection (2) of subsection (4) of said section, unless they are bonds of a municipality and within the exemption contained in said subsection (2). Although the revenue certificates in question are not bonds within the purview of section 6, article IX, of the Florida Constitution, they

may be bonds within the purview of said exemption in subsection (2) of said section 199.02. The said revenue certificates appear to be bonds within the broad definition of the word (5 Words and Phrases 648, et seq.). Although payable from a particular fund the revenue certificates are none-the-less obligations or bonds of a municipality and within the exemption contained in subsection (2) of said section 199.02.

The foregoing question should be answered in the negative.

November 7, 1947.—047-375.

#### PATENT INCOME—ROYALTIES TAXABLE—PERSONAL PROPERTY

QUESTIONS: 1. May the royalties to be received by a patentee for the use of his patent be capitalized and assessed as intangible personal property under chapter 199, Florida Statutes, 1941, as amended?

2. In case of an assignment of such royalties by the patentee, may the interest of the patentee be assessed as intangible personal property under said chapter 199, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

Although not included in the request the question of whether or not a patent is intangible personal property itself is apparent. A patent has been held to be incorporeal personal property (*Waterman v. Mackenzie*, 138 U.S. 252, text 260, 11 S. Ct. 334, 34 L. Ed. 923; *Whitcomb v. Whitcomb*, 85 Vt. 76, 81 A. 97, text 98; 48 C.J. 18, section 8; 40 Am. Jur. 534, section 4; 34 Words and Phrases 466), in the nature of a franchise (*Swindell v. Youngstown Sheet and Tube Company*, 144 C. C. A. 580, 230 Fed. 438), and analogous to the property in a share of stock (*Fruit Cleaning Company v. Fresno Home-Packing Company*, 94 Fed. 845, text 848, citing *Hall on Patent Estates*, Section 14). The situs of a patent right as property has usually been held to be the residence of its owner (48 C.J. 18, section 8; 40 Am. Jur. 534, Section 4). A patent, therefore, appears to be intangible personal property within the purview of section 199.01, Florida Statutes, 1941.

Although a patent is intangible personal property it does not follow that the royalties received from the use of such patent are also intangible personal property. The facts in the case of *Commonwealth v. Hannaford*, 159 Va. 84, 165 S. E. 512, show that a patentee, for and in consideration of the sum of fifteen thousand dollars, assigned his patent which prompted the question, as stated by the court, "Was the money, derived from the sale of the patent, income?" The court, upon the authority of *Fox Film Corporation v. Doyle*, 286 U.S. 123, 52 S. Ct. 546, 76 L. Ed. 1010 (which involved money received from a copyright), held the money to be income and not a return of capital. The Appellate Division of the Supreme Court of New York, in the case of *In Re. Elsner's Will*, 206 N.Y.S. 765, held that money received upon the sale of a copyrighted medical book was both a return of capital and income. Royalties from the sale or lease of oil and mineral resources of land have often been held income (20 Words and Phrases 507 et seq.). It appears that moneys received by a patentee as royalties from the assignment or lease of a patent right is probably income and not subject to taxation in this state. This seems to answer the first question in the negative.

Although royalties received by a patentee are in the nature of income, are such royalties also income of an assignee of such patentee for value? Income has been defined as something of value derived from labor, skill, ingenuity, sound judgment or property (20 Words and Phrases 456 et seq.); this might also be designated as gain or profit. The amount of royalties received by the assignee less the amount paid for the assignment would be the assignee's gain or profit (see 20 Words and Phrases 483 et seq.), or income. Under these circumstances royalties paid to an assignee would seem to be both a return of capital (the amount paid) and income (the

profit). An assignee's capital interest under the assignment would seem to have an analogy to a share of stock, which is intangible personal property, and the profits thereon would be analogous to the increase in value and dividends on stock. Like a share of stock the present value of the assigned interest may be subject to assessment as an intangible, but not the income or profits received thereon by the assignee which constitutes income. The taxable value of the property assigned would be the present value thereof and not the capitalized value of the payments to be received thereon.

July 30, 1947.—047-239.

#### FEDERAL BANKS—EXEMPTION—REAL ESTATE

**QUESTION:** Are shares of stock issued by federal land banks, federal home loan banks and other similar federal institutions, subject to taxation as intangible personal property, under chapter 199, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

"It is settled that the relation of the national banks to the United States, and the purposes intended to be subserved by their creation, are such that there can be no taxation, by or under state authority, of the banks, their property, or the shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation . . ." (*Des Moines National Bank v. Fairweather*, 263 U.S. 103, 44 Supreme Court 23, 68 Law Ed. 191, text 195). The relation of the federal loan and credit organizations under consideration, to the United States, and the purpose intended to be subserved by their creation are such that the foregoing rule as to national banks is applicable to them; they are governmental instrumentalities (*Federal Land Bank of St. Paul v. Rockford*, 69 No. Dakota 382, 287 N.W. 522; *M. G. West Company v. Johnson*, Cal. App.; 66 P. 2d. 1211). The mere silence of Congress on the question of taxation of federal government instrumentality, amounts to a prohibition and no tax may be levied by the state (*First National Bank v. Richmond*, 39 Fed. 309; *Swords v. Nut*, 11 Fed. 2d. 936).

Under the federal statutes relating to federal land banks and other farm loan organizations created by congress "Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from . . . State . . . taxation, except taxes upon real estate . . ." (Title 12 U.S.C.A., Section 931); provided nothing in this provision "shall prevent the shares in any joint-stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the bank is located." . . . (Title 12 U.S.C.A., Section 932).

Under the statutes relating to the federal home loan bank, "the bank, including its franchise, capital, reserves, and surplus, its advances, and its income shall be exempt from all taxation" except as to its real estate. (Title 12, U.S.C.A., Section 1433.)

I find nothing in the federal statutes permitting state taxation of the shares of stock issued by federal land banks, federal home loan banks and other similar federal institutions, except shares in joint stock land banks which may be taxed by the state wherein the bank is located but not by other states. The question must be answered in the negative, except as to shares of stock in joint stock land banks located within this state. If there are no joint stock land banks located within this state then the question should be answered in the negative.

February 18, 1947.—047-48.

#### MORTGAGE—SUBJECT TO INTANGIBLE TAX

**QUESTION:** Is a mortgage from an individual to the United States Department of Agriculture, Farm Security Administration, subject to Class "C" intangible tax?

*To Honorable C. M. Gay, State Comptroller:*

I presume from the correspondence that the mortgage is given by an individual to the United States of America acting by and through the Secretary of Agriculture pursuant to the provisions of Title 1 of the Bankhead-Jones Farm Tenant Act, and I further presume from the correspondence that the said mortgage was given for the acquisition of a farm, as set forth in the said act. (See paragraph 1001 of Title 7, U.S.C.A.)

Section 1024, Title 7, U.S.C.A., says:

"All property which is being utilized to carry out the purposes of Sections 1001-1005d of this title (other than property used solely for administrative purposes) shall, notwithstanding that legal title to such property remains in the secretary, be subject to taxation by the state, territory, district, dependency, and political subdivision concerned, in the same manner and to the same extent as other similar property is taxed."

Inasmuch as the State of Florida taxes similar mortgages as the one here in question (see section 199.11, Florida Statutes, 1941, as amended by the laws of 1943) it is my opinion that the mortgage in question is subject to the said intangible tax and I, therefore, answer the question in the affirmative.

July 15, 1947.—047-201.

#### PROMISSORY NOTE—LEASEHOLD—CLASSIFICATION

**QUESTION:** How should a promissory note executed in this state and secured by a mortgage encumbering a leasehold interest in real property in this state, be classified, under section 199.02, Florida Statutes, 1941, as amended, for intangible tax purposes?

*To Honorable C. M. Gay, State Comptroller:*

The promissory note in question was made, executed and delivered, in this state, and is secured by a mortgage encumbering a leasehold interest in certain real property in this state; said leasehold interest being for a term ending December 31, 1961, with an option for an additional ten-year term. I presume that the promissory note in question bears date subsequent to January 1, 1942, as the mortgage securing it bears date June 10, 1947.

The promissory note in question is within the definition of intangible personal property so as to be within the purview of chapter 199, Florida Statutes, 1941 (see section 199.01, Florida Statutes, 1941). The reading of section 199.02, Florida Statutes, 1941, as amended, indicates that the promissory note in question should be classified either as class "C" or class "D" intangible personal property; depending upon whether it is "secured by mortgage . . . upon real property situated in Florida." When the owner of real property in this state grants a lease to another, he conveys an interest in real property (Gibson v. Longino, 111 Fla. 533, 149 So. 592, text 593, and cases cited there; 35 C. J. 1140, Section 381), so as to be within the statute of frauds; however, the interest of the tenant in a lease for a term of years is personal property and not real property (32 Am. Jur. 39, Section 16; 35 C. J. 970, Section 47), so that it passes to the administrator as personal property, upon the death of the tenant, instead of to the heirs



as real property (33 C. J. S. 1065, Section 108). A leasehold estate in real property for a term of years is personal property, and is often referred to as a chattel real (50 C. J. 760 and 763, Sections 34 and 37). Chattel interests in real property, at common law, were taxed as personal property and not as real property (61 C. J. 190, Section 153). The promissory note in question is not one secured by a mortgage or lien upon real property so as to come within class "C" intangible personal property; it should, therefore, be classified as class "D" intangible personal property.

May 7, 1947.—047-123.

#### NONRESIDENT—LOCAL INCOME—PAYMENT

QUESTIONS: (A resident of Citrus county owns real property in New York from which she receives an income; each month this income is deposited to her credit in the local bank.)

1. Should she pay a Florida intangible tax on this money, and
2. Should this resident file a return in the State of New York, which state has an income tax law?

*To Honorable Hugh C. Barco, Tax Assessor, Citrus County, Inverness, Florida:*

In answer to the first question, article IX, section 11, of the Constitution of Florida, prohibits a tax upon the income of residents of the State of Florida. This constitutional amendment has been construed to prohibit a tax on the right of a resident beneficiary of foreign trusts to receive income for life (*Owens vs. Fosdick*, 13 So. 2d. 700). I see no distinction between a tax on the right of a resident beneficiary of a foreign trust to receive an income for life and a tax on the income of a resident of this state from foreign real property.

In my opinion, therefore, money derived from such income, as mentioned, is not subject to Florida's intangible tax.

As to the second question, I do not render an opinion thereon as this would require a construction of the New York law. This should be answered by the officials of the State of New York.

July 2, 1948.—048-221.

#### COLLECTION DELINQUENT PERSONAL PROPERTY TAXES

QUESTION: Where tangible personal property, previously assessed for intangible taxes, is removed from the county where assessed to another county within this state or from the state, what procedure should be followed by the tax collector in collecting or attempting to collect any delinquent taxes encumbering the said property?

*To Honorable C. M. Gay, State Comptroller:*

"All tangible personal property taxes shall be a lien on all of the personal property of the taxpayer in the county in which they are assessed from the first day of January for which year the property is liable to assessment." (Section 200.02, Florida Statutes, 1941, as amended.) "All taxes assessed upon tangible personal property, from the date such taxes become due, shall have the force and effect of a judgment and execution at law against the owner of such property," except his real property. (Section 200.30, Florida Statutes, 1941.) "Beginning on the first day of May the tax collector . . . shall levy upon and seize tangible personal property of the delinquent taxpayer for unpaid taxes" (section 200.28, Florida Statutes, 1941), and sell the same as provided by law (sections 200.28 et seq., Florida Statutes, 1941). "In case any tangible personal property upon which the taxes shall have been assessed is removed from the county in which . . . assessed" the tax collector may issue his warrant for the collec-

tion of such tax, to the sheriff of the county to which such property was removed, which "sheriff may proceed thereon as upon execution from the circuit court." (Section 200.30, Florida Statutes, 1941.)

"Tax warrants issued by the tax collector for the collection of tangible personal property taxes shall have the same force and effect as a writ of garnishment" (section 200.31, Florida Statutes, 1941) and the tax collector is required to "keep a record of all warrants" (section 200.32, Florida Statutes, 1941) and it becomes his duty "to continue from time to time his efforts to collect the same for a period of seven years" (section 200.33, Florida Statutes, 1941). In this connection see also the opinions of the attorney general published in the following biennial reports: 1927-1928 page 335, 1929-1930 page 375, 1931-1932 page 513, 1935-1936 pages 37 and 38, and 1941-1942 page 182. Under the foregoing statutes and authorities it seems that when tangible personal property, which has been previously assessed for taxes, is removed from the county where assessed to another county that the tax collector of the county where assessed may collect the taxes against such removed property by levy and sale of other personal property of the taxpayer found in his county. He may also issue his warrant to the sheriff of the county to which such property is removed which warrant may be levied against the property removed to such county or against other personal property of the taxpayer as in executions issued by the circuit court. Where assessed property is removed from the county where assessed to another state the taxes assessed may be collected by levy and sale of other personal property of the taxpayer within the said county. There is doubt as to whether a warrant might, under the statute, be issued to the sheriff of another county to which the property in question was not removed. This opinion does not purport to pass upon the constitutionality of any of the statutes considered.

### GROSS RECEIPTS TAXES

February 17, 1948.—048-62.

#### PREMIUMS—ANNUITY CONTRACT PAYMENTS—DEDUCTIONS

**QUESTION:** In computing the annual tax on gross receipts of premiums or considerations received by an insurer on annuity contracts, may such an insurer deduct from the total amount of such sums received amounts paid by the insurer to annuitants, or their beneficiaries, upon cancellation of such contracts?

*To Honorable J. Edwin Larson, State Treasurer:*

Premiums or considerations received by insurers on annuity contracts or policies from holders thereof in this state were not subject to the gross receipts tax now prescribed until the amendment of section 205.43 by chapter 22671, Laws of Florida, acts of 1945. The section, as amended in that respect, provides that insurers, as defined in the act, shall, "on or before March 1, 1946, pay to the state treasurer an amount equal to one-half of one per cent of the gross receipts of premiums or considerations on annuity policies or contracts paid by the holders thereof in this state, and shall on or before the first day of March of each year thereafter pay to the state treasurer an amount equal to one per cent" of the gross receipts of such premiums or considerations. It will be noted that in other parts of section 205.43, as amended, relating to the tax imposed upon gross premiums received on insurance policies, as described, certain definite items are listed which are to be omitted or deducted and certain others which are not to be deducted in computing that tax. As will be observed, there are no such detailed items in connection with the tax imposed on gross receipts of premiums or considerations on annuity contracts.

It would appear that the request for this opinion resulted from the claims of certain insurers of deductions from the amount of premiums or considerations received in computing the aforesaid tax thereon. The re-

quest for opinion sets forth no particular type of annuity contract involved and the insurance commissioner's office has been unable to furnish more specific information; neither do the deductions made by such insurers in their tax returns indicate the particular types of such contracts. In the absence of knowing the particular types of contracts involved, certain possible types of these contracts are mentioned.

Generally, an annuity is defined as being an obligation to pay a stated sum, usually annually, to a named person, such payments to terminate upon the death of the designated beneficiary. (Appleman, *Insurance Law and Practice*, Vol. 1, page 71.) It is known that certain of the contracts issued by insurers as annuity contracts have features which vary in certain particulars from that general definition. Thus, it would seem that it is not unusual for such contracts to contain provisions to avoid loss of invested funds in the event of death of the annuitant or, when instalment payments are involved, discontinuance of the contract; and, hence, it appears further that payments might be required in pursuance of such contracts under various stated circumstances. Whether payments made under any of such circumstances are properly deductible from the gross receipts of considerations in computing the tax here involved could be determined only if the terms of the contracts and the circumstances of payments made thereunder are known.

In view of the foregoing, in my opinion the question is answered as follows:

In the absence of a showing of the particular nature of the contracts in connection with which amounts paid by certain insurers to annuitants or their beneficiaries are claimed by the insurers as lawful deductions in computing the tax, as aforesaid, it would seem that the insurance commissioner should refuse to permit such deductions in computing said tax. If the question is referred again to this office in connection with particularly described contracts and the circumstances of payments made thereunder and claimed by insurers as deductions, as aforesaid, definite advice will be furnished in response thereto.

October 5, 1948.—048-321.

#### DEDUCTIONS—ANNUITY CONSIDERATIONS

**QUESTIONS:** In computing the annual tax provided by section 205.43, Florida Statutes, 1941, as amended, on the gross receipts of premiums or considerations received by an insurer on annuity contracts, may such insurer deduct from the total amount of such sums received amounts paid by the insurer to those entering into such contracts with the insurers, or their beneficiaries, upon termination of such contracts prior to maturity under the following circumstances:

1. Upon cancellation of an annuity contract in pursuance of election of annuitant named, and refund to the annuitant of the total consideration theretofore paid by him to the insurer?
2. Upon death of annuitant and return of amount paid by him to a named beneficiary?
3. In the instance of a group annuity contract where an employee has made regular contributions, upon termination of employment, or death of employee, refund of contributions paid to the former employee or his designated beneficiary?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Section 205.43, provides that insurers shall pay annually an amount equal to two per cent of the gross amount of receipts of insurance premiums or assessments received, "omitting premiums on reinsurance accepted, and less return premiums or assessments, but without deductions for reinsurance ceded to other companies, and without deductions for moneys

paid upon surrender of policies or certificates for cash surrender value, and without deductions for discounts or refunds for direct or prompt payment of premiums or assessments, and without deductions on account of dividends of any nature or amount paid and credited or allowed to holders of insurance policies, etc."

Prior to the amendment of section 205.43 by chapter 22671, Laws of Florida, acts of 1945, no contention was ever made that premiums on insurance policies or certificates or surety, indemnity, or reciprocal inter-insurance contracts or agreements, as contemplated by said section, included premiums or considerations paid on annuity contracts. The amended section, in addition to the tax on insurance premiums, etc., also required that insurers, as defined in the section, "on or before March 1, 1946, pay to the state treasurer an amount equal to one-half of one per cent of the gross receipts of premiums or considerations on annuity policies or contracts paid by holders thereof in this state, and shall on or before the first day of March of each year thereafter pay to the state treasurer an amount equal to one per cent of the gross receipts of premiums or considerations on annuity policies or contracts paid by holders thereof in this state."

It will be noted particularly from the quoted parts of said amended section that the part imposing the tax on gross insurance premiums and assessments, states in detail the items which may be and may not be deducted from such gross receipts for tax purposes, whereas that part imposing the tax on gross receipts of premiums or considerations on annuity policies or contracts sets forth no detailed items which may or may not be omitted in the computation of said tax.

In *Equitable Life Assurance Society vs. Hobbs* (Kan.) 114 P. 2d. 871 and 127 P. 2d. 477 (two cases), the court in that state decided that considerations paid for annuities were included in the statutory wording "a tax upon all premiums" received during the preceding year by foreign insurers; and that the statutory deduction of "premiums returned on account of cancellation" included the return of considerations on annuity contracts not retained by the company. In *Equitable Life Assurance Society vs. Johnson* (Col.), 127 P. 2d. 95, the court held that a constitutional provision for a tax "upon the amount of the gross premiums received" by an insurer doing business in that state, included premiums or considerations paid on annuity contracts, and that the constitutional wording, "less return premiums" included cash surrender values paid on annuity policies before the risk attached. It is specifically noted that in each of these cases the courts recognized the returned consideration as a deduction for tax purposes in pursuance of specific statutory or constitutional authority; in neither case was it claimed or intimated that in the absence of such authority, gross receipts contemplated the sum remaining after a deduction for return consideration.

In view of the foregoing in my opinion the questions are properly answered as follows:

Since section 205.43, does not provide that in computing the tax on "gross receipts of premiums or considerations on annuity policies or contracts," returned premiums or considerations, as contemplated by the three instances in the foregoing questions, can be deducted from such total annual amount received, it would seem to have been the legislative intent not to provide for such deduction. While this rule may seem harsh, in the absence of court adjudication, it seems to be the reasonable one to apply here in view of the wording of the section of law involved. Hence, all questions are answered in the negative.

July 27, 1948.—048-253.

#### INSURANCE COMPANIES—EXCISE TAXES

QUESTION: Prior to the amendment of section 205.43, Florida Statutes, 1941, by chapter 22671, Laws of Florida, acts of 1945, a certain



domestic insurance company, engaged in the writing of fire insurance and other lines, was exempt from the payment of the state excise tax on premium receipts, provided in said section, by virtue of subsection 6 thereof. Section 175.05, Florida Statutes, 1941 (section 5 of chapter 19112, Laws of Florida, acts of 1939), provided for the imposition upon companies writing fire or tornado insurance of an additional excise tax by municipalities as contemplated by section 175.05. The last clause of section 175.05 contains the proviso "that this chapter shall not be construed to require the payment of an excise tax by an insurance company that does not now pay such tax." By the 1945 amendment of section 205.43, such company became subject to the payment of the state excise tax prescribed thereby. Is such company now required to pay the excise tax assessed by municipalities in pursuance of section 175.05?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

In my opinion, the last clause of section 175.05, exempting certain insurance companies from the payment of the tax as therein provided, had reference to those insurance companies which were exempt from the payment of excise taxes at the time of the passage of chapter 19112, and they remained exempt so long, but only so long, as such companies were not required to pay a state excise tax. Thus, it would seem that the amendment of section 205.43 by the 1945 act, removing the exemption with reference to this company and the state excise tax, also, in effect, removed the company from the quoted exemption clause of section 175.05, making the company liable for payment of the excise tax required by such last-named section. Hence, it would seem that this company is now subject to payment of the tax prescribed by section 175.05; and the question is answered in the affirmative.

June 10, 1948.—048-211.

#### TRAILER PARK OPERATORS—ELECTRICITY—GROSS RECEIPT TAX

**QUESTIONS:** 1. Is the operator of a trailer park who furnishes a maximum quantity of electricity as part of the rental charge, and who makes an additional charge for electricity consumed in excess of the maximum, subject to the imposition of gross receipt tax under the provisions of chapter 203, Florida Statutes, 1941?

2. Is the operator of a trailer park who furnishes electricity to the tenants of the park, the charge for which is based upon the amount of current furnished as determined from a separate meter through which the current is conducted, subject to the imposition of gross receipts tax under the provisions of chapter 203, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 203, Florida Statutes, 1941, imposes a tax upon every person receiving payment for electricity furnished for light, heat or power, and requires an annual report to the comptroller of the amount of gross receipts derived from such source. The statute requires the production of all books, records and accounts of business done for examination by the comptroller through his representatives. The Supreme Court of Florida has construed the chapter to "impose a sales tax upon corporations, firms and individuals receiving payment for electricity . . ." (*Jacksonville Gas Co. v. Lee*, 110 Fla. 61.)

As to question 1, it appears from the material submitted with request for opinion that the class of operators described receive payment for electricity furnished, the amount of which is computed from a fixed charge collected monthly with the charge reserved as rental of the park space. Under these circumstances, the charge made would fall within the language of the statute as "payment for electricity for light, heat or power," hence this question is answered affirmatively.

As to question 2, it appears from the material submitted with request for opinion that the operators described in this question purchase electricity in quantity from a distributing company, measured by means of a master meter, which they resell to their tenants measured by means of individual meters located at the several spaces rented, receiving payment at a charge fixed for the quantity of electricity consumed. Under these circumstances, the receipts derived from the resale of the current clearly fall within the provisions of the statute. Such operators come within the same category as cities purchasing electricity from an electric generating company for resale to its residents. (*Brooks Scanlon Corp. v. Lee*, 131 Fla. 197.) This question is accordingly answered affirmatively.

### CHAIN STORE TAXES

August 19, 1947.—047-284.

#### CHAIN STORE DEFINITION—STOCK OWNERSHIP—EFFECT OF OWNERSHIP

**QUESTION:** Does the Howe E. Moredock Company of Miami, Florida; the Quinn R. Barton Company of Jacksonville, Florida; the Florida Equipment Company of Jacksonville, Florida; and their subsidiaries compose a chain store within the purview of chapter 204, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

The perusal of the file furnished with the request for opinion reveals the following facts and circumstances:

1. The Howe E. Moredock Company of Miami, Florida, has outstanding 1,000 shares of stock, of which Mr. and Mrs. Howe E. Moredock, Sr., own 412 shares and Quinn R. Barton owns 412 shares. The said Howe E. Moredock Company owns a majority of the outstanding shares of stock of the Howe E. Moredock Company, of Homestead, Florida, and of the Pompano Truck and Tractor Company of Pompano, Florida.

2. The Quinn R. Barton Company of Jacksonville, Florida, has outstanding 921 shares of stock, of which Howe E. Moredock, Sr., owns 450 shares and Quinn R. Barton 448 shares. The said Quinn R. Barton Company owns a majority of the outstanding shares of stock of the Florida Motor Equipment Company of Gainesville, Florida; and the Florida Truck and Tractor Company of Palatka, Florida; and the Central Truck and Tractor Company of Ocala, Florida.

3. The Florida Equipment Company of Jacksonville, Florida, has outstanding 500 shares of stock, of which Howe E. Moredock, Sr., owns 248 shares and Quinn R. Barton 248 shares. The said Florida Equipment Company owns a majority of the outstanding shares of stock in the Florida Equipment Company of Miami, Florida, and of the Florida Equipment Company of Tampa, Florida.

Quinn R. Barton and H. E. Moredock are on the Board of Directors of the Howe E. Moredock Company of Miami, Florida; The Quinn R. Barton Company of Jacksonville, Florida; and the Florida Equipment Company of Jacksonville, Florida; as well as the Florida Equipment Company of Tampa, Florida; the Florida Equipment Company of Miami, Florida; the Central Truck and Tractor Company of Ocala, Florida; the Florida Truck and Tractor Company of Palatka, Florida; and the Florida Motor Equipment Company of Gainesville, Florida. Howe E. Moredock, Sr., also appears to be upon the Board of Directors of the Pompano Truck and Tractor Company, of Pompano, Florida, and the Howe E. Moredock Company of Homestead, Florida. A majority of the Board of Directors of the Florida Equipment Companies of Jacksonville, Tampa and Miami, Florida, are the same persons. Each of the several corporations appears to have interlock-

ing directors. Quinn R. Barton and Howe E. Moredock appear to have sufficient stock ownership to direct and control the operations of all the aforementioned corporations. They would be able, through their stock ownership, to select the Board of Directors for each and every of the corporations. This seems to bring us to the question of whether or not stock ownership between two persons, and interlocking directors, are sufficient to make that group of stores a chain store within the purview of chapter 204, Florida Statutes, 1941. There does not appear any cooperative advertising or buying between the several stores or groups of stores, group control or buying and selling or other outward evidence of a chain store.

"Chain stores," as used in chapter 204, Florida Statutes, 1941, means "a group or chain of two or more stores, one or more of which are located in this state, under the same management, supervision, or ownership, whether such management, supervision or ownership is direct or indirect, and whether mediate or intermediate, or is accomplished through stock ownership in one or more corporations, trusteeships or by any other device whatsoever . . ." In other words, a group of stores is a chain when it is under the same management, supervision or ownership, whether accomplished through stock ownership, or other device.

From the above statement of facts it is clear that Quinn R. Barton and Howe E. Moredock, Sr., through their stock ownership, have the power to assume the management and supervision of all the stores in question. These two persons seem to have sufficient stock ownership or control to elect the boards of directors for each of the several stores. They are both on the board of directors of most of the corporations, and one or the other of them is on every such board of directors. These facts seem to be *prima facie* sufficient to constitute the several stores in question as a chain of stores. I do not think that our supreme court intended to hold that every chain of stores should possess all the elements mentioned by it in the case of *Lee v. Herndon*, 151 Fla. 657, 10 So. 305, text 306. Under the statement of facts, group control of store operation is present or possible through stock ownership.

Under the facts presented by the record in this case I am of the opinion that the question should be answered in the affirmative.

September 22, 1948.—048-311.

#### DEALERS—LIQUEFIED GAS—APPLIANCES AND EQUIPMENT

**QUESTION:** Were the provisions of chapter 204, Florida Statutes, 1941, insofar as the same may have been applicable to dealers in the liquefied petroleum gas, and in appliances and equipment for the use of such gas, repealed or otherwise affected by the adoption of chapter 24302, Laws of Florida, acts of 1947 (chapter 526, Florida Statutes, 1941)?

*To Honorable C. M. Gay, State Comptroller:*

Reference is hereby made to an opinion of this office dated October 13, 1947 (047-342), upon the question of the effect of said chapter 24302, Laws of Florida, acts of 1947, upon the general occupational license taxing statutes (chapter 205, Florida Statutes, 1941), wherein it was held that said chapter 24302 was a license tax law and not a regulatory measure, and that no license under said chapter 205, Florida Statutes, 1941, was required in addition to the license under said chapter 24302. Said chapter 24302 contained no clause repealing other laws or parts of laws or any specific statutes or laws, so that if chapter 204 was repealed it must have been by implication and because in conflict with said chapter 24302.

Section 204.15, Florida Statutes, 1941, provides that the license taxes imposed by said chapter 204, Florida Statutes, 1941, "shall not repeal any other license tax, excise tax, or tax levied by law as a condition precedent to engaging in business in the State of Florida." This provision shows that there may be license taxes for the operation of a business in addition to

the chain store taxes. Chain stores, by reason of their nature, may be separately classified for purposes of taxation. (53 C. J. S. 545, section 22.) It seems that the owner and operator of a "chain store" may be required to pay the chain store tax notwithstanding payment of license taxes specially applying to such operator under other classifications (Dunlop Tire and Rubber Company v. Lee, 126 Fla. 369, 171 So. 331; Bentley-Gray Dry Goods Company v. City of Tampa, 137 Fla. 641, 188 So. 758). The constitution of this state does not prohibit double taxation (Klemm v. Davenport, 100 Fla. 627, 129 So. 904, 70 A. L. R. 156), neither does the federal constitution (City of Deland v. Florida Public Service Corporation, 119 Fla. 804, 161 So. 735), unless the equal protection or some other provision of the constitution is also violated.

In the light of these observations it seems clear that the same business may be taxed under more than one classification. Chapter 204, Florida Statutes, 1941, the chain store law, makes one classification and chapter 24302 another.

I am, therefore, of the opinion that the question should be answered in the negative.

### LICENSE TAXES

August 7, 1947.—047-243.

#### OCCUPATIONS—PENALTY—APPLICATION

QUESTION: Does the ten per cent penalty provided for in section 205.11, Florida Statutes 1941, as amended by section 1, chapter 24112, Laws of Florida, acts of 1947, apply to any occupational licenses for the current year beginning October 1, 1946, and ending September 30, 1947?

*To Honorable C. M. Gay, State Comptroller:*

The amendment of 1947 added the following language to the existing law "and there shall be added thereto, and become a part of the tax, a penalty of ten per cent of the original amount of such license tax." The original section contained no such penal provision. As a general rule new material added to an existing statute by amendment is effective from the effective date of the amendment (59 C. J. 925, 928 and 1183, sections 527, 530 and 719). The amendatory statute here involved became effective on June 16, 1947.

In the absence of express provision a statute imposing penalties upon delinquencies in the payment of taxes does not apply to taxes delinquent at the time the statute takes effect (51 Am. Jur. 854, Section 977; 59 C. J. 1172, Section 697; 61 C. J. 1483, Section 2107; Annotation 77 A. L. R. 1134). Although there are a few cases that seem to hold otherwise (Annotation 77 A. L. R. 1038), when consideration is given the rule in this state that taxing statutes are to be construed against the state and in favor of the taxpayer (Texas Company v. Amos, 77 Fla. 327, 81 So. 471, text 472), I think no retroactive construction should be given to the act in question. This being true, only license taxes becoming delinquent after June 16, 1947, should be held to be within the purview of the penal provision of the statute as amended; license taxes already delinquent on said June 16, 1947, should not be held subject to the penalty mentioned in the statute as amended.

February 6, 1948.—048-40.

#### DELINQUENT OCCUPATIONAL LICENSES—INSPECTORS

QUESTION: Does the Board of County Commissioners of Monroe County have the power to hire license inspectors to check places of business of those who have not obtained occupational licenses?



*To Honorable Frank Bentley, Chairman, Board of County Commissioners, Key West, Florida:*

I assume that there is no special law of Monroe county applicable to this situation.

I find no law authorizing the county commissioners to hire and pay for such inspectors, and in the absence of such law I must answer the question in the negative.

Section 205.10, Florida Statutes, 1941, and section 205.11, Florida Statutes, 1941, as amended by chapter 24112, Laws of Florida, 1947, seem to place the duty upon the tax collector of ascertaining the ones who are delinquent in the payment of such licenses.

April 4, 1947.—047-90.

#### AIR LINES—OCCUPATIONAL LICENSES

**QUESTION:** What occupational licenses are required for the operation of an air line company, flying entirely within this state?

*To Honorable C. M. Gay, State Comptroller:*

Every person engaged in the business of performing services for the public in return for a consideration is required to obtain an occupational license under section 205.53, Florida Statutes, 1941. It seems clear that an air line company furnishing transportation is a public service company. I am, therefore, of the opinion that an occupational license under section 205.53 should be required.

March 24, 1948.—048-110.

#### OCCUPATIONAL LICENSE—CHEROKEE INDIANS—EXEMPTION

**QUESTION:** Are members of a tribe of Cherokee Indians entitled to an exemption from occupational license taxes imposed by the laws of this state upon businesses, occupations and professions done or performed within this state?

*To Honorable C. M. Gay, State Comptroller:*

There is nothing in the constitution or statutes of this state expressly granting exemptions from occupational license taxes to members of Indian tribes; therefore, if they are entitled to such an exemption it must be by reason of some federal law, some treaty with the Indians, or by some general rule of law not statutory. There is no Cherokee tribe of Indians located within this state, so that any Cherokee Indian applying for a license in this state would be of a tribe located in another state.

Indian tribes or nations are distinct, semi-independent political communities, sometimes defined as domestic dependent nations (42 C. J. S. 658, section 9). Such tribes or nations are not amenable to the laws of the state wherein they are located (42 C. J. S. 660, section 9). Indian laws and customs usually control the internal affairs of the tribe (42 C. J. S. 665, section 14), and such tribes have the ordinary powers of taxation over persons and property within its limits (42 C. J. S. 665, section 12). Under article 1, section 8, clause 3, of the federal constitution, congress is granted power "to regulate commerce . . . the Indian tribes." This regulation would seem to be coextensive with the power of Congress to regulate interstate commerce (*Hanley v. Kansas City Southern Railroad Co.*, 187 U. S. 619, 23 S. Ct. 214, 47 L. Ed. 333).

Indian tribes are dependents of the federal government, and their members are wards of the federal government, entitled to the care and pro-

tection due from a guardian to his ward (42 C. J. S. 672, section 20); this guardianship relates primarily to property rights and economic welfare (42 C. J. S. 674, section 20). Generally speaking, the authority and power of the federal government over Indians and Indian country is superior and paramount to state authority (42 C. J. S. 777, section 70). Indian tribes, at least until 1871, were considered as sufficiently independent to be able to enter into treaties with the federal government (42 C. J. S. 681, et seq., sections 24, et seq.).

It has been held by at least one of the state courts that Cherokee Indians, not having the benefits of our government extended to them, are not subject to its burdens; because taxation without representation is tyranny. (*State v. Ross*, 7 Yerg., Tenn., 74, text 77; *Pope v. Phifer*, 3 Heisk., Tenn., 682, text 699.) Under the treaties with the Cherokee Indian nation the Congress of the United States has the exclusive right to regulate trading with such Indians and the managing of all their affairs (see article IX of the Hopewell, and article VI of the Holston, Indian treaties).

Although it seems that Indians living upon Indian reservations and maintaining tribal relations are not subject to state taxation and may not be required to obtain a state occupational license as a condition to carrying on a business, occupation or profession on the reservation, I find no statute or law extending this exemption to Indians not living upon reservations or maintaining tribal relations.

The question should be answered in the negative; unless the applicant for license points out to the tax collector some valid treaty provision or statute of the United States expressly granting such exemption and showing that he is within the purview of such treaty or statutory provision. There is no state statute or law granting such an exemption.

February 6, 1948.—048-43.

#### EMPLOYMENT AGENCIES—OCCUPATIONAL LICENSE

**QUESTION:** Are occupational licenses, under section 205.53, Florida Statutes, 1941, required of employment agencies doing business in this state, in addition to the licenses provided by chapter 24080, Laws of Florida, acts of 1947?

*To Honorable C. M. Gay, State Comptroller:*

Section 205.13, Florida Statutes, 1941, provides that "fees or licenses paid to any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this chapter or other law unless otherwise expressly provided by law." This raises the question of whether the license fee required by chapter 24080, Laws of Florida, acts of 1947, is a regulatory measure or merely an occupational license.

The title to said chapter 24080 indicates that it is "an act to regulate the business of private employment agencies in Florida;" etc. Although an annual license fee of one hundred dollars is charged for each place of business (section 2) such fees are to be used "solely for administering this act" (section 11). In addition to the foregoing indications of the purpose of the act, a reading of the entire act indicates that its intent and purpose was regulatory only and there is no indication in said act that it was to be in lieu of occupational taxes. Moneys collected under this act are used exclusively for regulatory purposes while occupational license taxes are used for governmental and not regulatory purposes. There is no material conflict between said section 205.53 and chapter 24080.

The question is answered in the affirmative.

March 24, 1948.—048-105.

OCCUPATIONAL LICENSE—CORPORATION—PROFESSIONAL  
ENGINEERS

QUESTION: Where a corporation engages in the practice of professional engineering within this state, through duly registered professional engineers employed by it, may such practice be carried on under one occupational license issued to the corporation or should each registered engineer employed by the corporation be required to obtain an occupational license?

*To Honorable C. M. Gay, State Comptroller:*

Section 471.06, Florida Statutes, 1941, provides that "a corporation, firm or partnership may engage in the practice of professional engineering in this state; provided, that one or more of the principal officers of said corporation or firm, or members of said partnership, are registered professional engineers . . . and . . . that said practice shall be carried on directly by professional engineers duly registered under this chapter." Section 205.52, Florida Statutes, 1941, requires that "every person" (which includes corporations, firms and partnerships, see section 205.68, Florida Statutes, 1941) "engaged in the practice of any profession . . . shall pay a license tax of ten dollars for the privilege of practicing, which license tax shall not relieve the person paying the same from the payment of any license tax imposed on any business operated by him."

It has been held in this state that each member of a firm of lawyers must pay a license tax, not merely one license for the firm (*Blanchard v. State*, 30 Fla. 223, 11 So. 785; 1903-1904 Biennial Report 74); that every lawyer employed by a firm of lawyers is required to obtain a separate license (1929-1930 Biennial Report 381; 1931-1932 Biennial Report 746); and that a piano tuner, employed by a duly licensed music store, is required to obtain a separate license (1933-1934 Biennial Report 12). A tax imposed on persons operating or conducting certain businesses, is usually payable by the principal and not by his agents and employees; but where the tax is imposed upon particular professions or occupations, one who is engaged in such profession or occupation is not relieved of liability for the tax by the fact that he is acting as employee or agent of another. (53 C. J. S. 659, section 47; 37 C. J. 249, section 115.) Many sections of our licensing statutes relate to the operation of a business (sections 205.28, 205.29, 205.30, etc., Florida Statutes, 1941), other sections to operation of certain kinds of places (section 205.37, Florida Statutes, 1941), other sections to occupations (section 205.41, Florida Statutes, 1941), and other sections to the practice of professions (section 205.52, Florida Statutes, 1941). In this connection see *Blanchard v. State*, 30 Fla. 223, 11 So. 785. In the light of the aforesaid authorities and observations I am of the opinion that the fact that a license is procured by the corporation does not relieve any person, who may be practicing professional engineering for the corporation as its employee, from the obligation of also procuring a license.

Of course if a registered engineer is working for the corporation in some capacity, not requiring professional duties, the fact that he was a registered engineer would not of itself be sufficient to require a license; a license is only required when he performs some professional work. The question of whether or not he is performing professional services within said section 205.52 is a question of fact for the tax collector to determine in the first instance.

October 14, 1947.—047-340.

ATTORNEYS AS ADJUSTERS—LICENSE REQUIREMENTS—  
QUALIFICATIONS AS ADJUSTER

QUESTION: Are attorneys at law, duly licensed to practice law in the courts of this state, required to be licensed as insurance adjusters as

prescribed by chapter 23966, Laws of Florida, acts of 1947, in order to adjust insurance losses in this state?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 23966 provides in detail for the examination, licensing and regulation of insurance adjusters under the supervision of the insurance commissioner of this state.

Section 1 of the act provides, in part, that, "The term 'Insurance Adjuster' as used herein shall mean a person who undertakes, either in behalf of the insurer or insured, to ascertain and determine the amount of any claim, loss or damage payable under any contract of insurance and/or undertakes to effect settlement of such claim, loss or damage."

Without question, under the limited circumstances and conditions found in section 12 of the act, attorneys at law may be designated by insurers to adjust losses. The only specific reference to attorneys at law found in the act is in section 11 thereof, which provides, in effect, that duly licensed attorneys need not qualify as adjusters under the act to authorize them to adjust or participate in the adjustment of a claim, loss or damage arising under policies of liability insurance involving the claims of third persons against the insureds in such policies. Whether settlement of such a claim of one person against another covered by liability insurance would otherwise, but for the provisions of section 11, constitute an insurance adjustment, is not here argued—it has been so treated as an insurance adjustment in this act. Yet it is not considered that this mention of the specific instance permitting an insurance adjustment by an attorney should invoke the rule of "expressio unius est exclusio alterius" concerning the right of attorneys under chapter 23966 to settle or participate in the settlement of claims, losses or damages arising under contracts of insurance in all other instances.

Further, it is not considered that the Legislature, in the enactment of chapter 23966, intended to deprive lawyers, as such, from settling or participating in the settlement of claims arising under contracts of insurance where there is denial of liability, or uncertainty as to contract terms, or actual controversy as to liability or extent of liability.

The question is a general one not related to a factual situation; hence, the answer below is a general one, and an answer more specific and certain than the one given below must depend upon the facts of individual cases. Thus qualified, in my opinion the question is answered as follows:

(a) As remarked, an attorney licensed to practice law in the State of Florida may adjust insurance losses without being required to qualify under chapter 23966 under the circumstances and in the instances contemplated by sections 11 and 12 of said chapter.

(b) Where there is a denial of liability under a contract of insurance or uncertainty exists with respect to the provisions of such contract or an actual controversy arises or exists concerning liability under such a contract or the amount payable thereunder, an attorney duly licensed to practice law in this state may, without qualifying as an adjuster under chapter 23966, as counsel for either the insurer or insured, settle or participate in the settlement of any asserted claim, loss or damage under a policy or contract of insurance.

(c) An attorney duly licensed to practice law in Florida may not, without qualifying as an adjuster under chapter 23966, represent either the insurer or insured in connection with the ascertainment and determination of the amount of any claim, loss or damage payable under any contract of insurance and may not undertake to effect settlement of any such claim, loss or damage, when none of the elements or circumstances set forth in the preceding paragraph hereof is present. It is recognized that quite often when claim arises under a contract or policy of insurance, difference exists between the insurer and insured as to the amount pay-



able under the policy or contract. It is not considered that negotiations which are naturally incident to and reasonably calculated to result in the adjustment of the loss, in such instances, constitute an "actual controversy" within the meaning of such words as they are used in the preceding paragraph hereof.

January 15, 1947.—047-6.

#### INSURANCE AGENT—PLACE OF PAYMENT

QUESTIONS: 1. Is a county occupational license tax required to be paid for a nonresident life insurance agent who solicits business actively in the State of Florida?

2. Is an occupational license tax for such an agent required for each and every county in which he solicits business in this state, regardless of whether or not his company maintains an office within the state or the agent maintains a residence or business address within the state?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

An opinion of this office of September 26, 1946 (No. 046-408), held, in effect, that as to resident life insurance agents, a county occupational license tax was required to be paid only in the county where such agent resided and had his place of business; provided that if such agent maintained an office or place of business in more than one county, in each such county such tax was payable.

Section 205.45, 1945 Supplement to Florida Statutes, 1941, fixes the occupational license tax for agents "authorized to solicit, negotiate, effect or write contracts of insurance, etc." in this state; and the provisions are applicable alike to resident life agents and to nonresident life agents authorized to act as such agents in Florida. Section 635.01, Florida Statutes, 1941, would seem to authorize licensing of a nonresident life agent whose state grants like privileges to persons residing in this state. Such section 635.01 must be read in connection with and as limited by section 635.21, Florida Statutes, 1941 (chapter 22053, Laws of 1943), which renders it unlawful for any foreign insurance company to write any policy on the life of a person in this state where the same is applied for in this state, or the medical examination of the insured is made in this state, unless such policy is written or delivered through a licensed "agency" of the insurer in Florida, or "agency" having "territory" in Florida. This office issued an opinion on September 16, 1943 (No. 043-246) that the word "agency," as used in said section 635.21 was synonymous with "agent"; and that "territory," as there used, contemplated a definite area within Florida wherein an agent is authorized to solicit and sell insurance by this company. Hence, this opinion is applicable to those authorized nonresident life agents within the meaning of the laws mentioned herein.

In view of the foregoing, it is my opinion that the questions are properly answered in their numbered order as follows:

(1) A county occupational license tax is required for such a nonresident life agent.

(2) If such an agent maintains a place of business in a county in Florida, an occupational license tax is required to be paid for him in such county only, even though his territory includes more than that county; provided, that in each county where he may maintain such a place of business an occupational license tax is required. The office maintained in this state by the company which such agent represents would not, in my judgment, constitute a place of business of such agent unless he actually used such office for said purpose. A temporary residence of such agent in Florida could constitute his place of business if used by him for that purpose.

If such an agent does not have and maintain in Florida any such place of business, then it would seem that since his business and occupation in

Florida cannot be identified with any particular county, an occupational license tax is required in each county in which he conducts his business.

(3) For the amount of occupational license tax required for such a nonresident agent, attention is directed to the provisions of section 627.37, Florida Statutes, 1941, to consider the effect thereof in relation to the amount of such tax.

March 6, 1947.—047-66.

#### INCIDENTAL BUSINESS—MORTGAGE LOANS—INSURANCE

QUESTION: If an insurance company operates a separate office wherein it is engaged in the business of trading, bartering, buying, lending or selling intangible personal property, is such business required to obtain a state and county occupational license under section 205.53, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

The answer to the foregoing question should be in the affirmative, unless "the trading, bartering, buying, lending or selling is incidental to and a part of some other business on which an occupational license tax is imposed" by some other statute or law of the state. (See said section 205.58.) The question as stated in request for opinion does not indicate whether or not the business in question is incidental to or a part of some other business of the insurance company; however, reference to the office file appended reveals that the business in question is the business of making mortgage loans on property in Polk county and maybe other counties of the state. It also appears that loans, by one insurance company, are being made through a district office in the county, and by the other insurance company, through an agent not connected with any district or other office of the company, but merely representing the company as agent.

Section 205.58, Florida Statutes, 1941, provides that "every person engaged in the business of trading, bartering, buying, lending or selling intangible personal property, whether as owner, agent, broker, or otherwise, shall pay a license tax . . . for each place of business." However, no license is to be required where such business is incidental or a part of some other duly licensed business.

Insurance companies wishing to do an insurance business in this state are required to obtain an occupational license and pay a license tax under sections 205.43, 205.44 and 205.44-1, 1945 Cumulative Supplement to Florida Statutes, 1941, consisting of a flat license fee of \$250.00 per annum and two per cent of the gross premiums and other fees received by it from policyholders in this state. In some instances this license fee amounts to several thousand dollars per year: I am of the opinion that this license fee is the only one required of insurers to permit them to do an insurance business in this state. This seems to raise the question as to whether the making of mortgage loans, by an insurance company doing an insurance business in this state, "is incident to and a part of" its insurance business for which an occupational license is required of it under section 205.43, 1945 Cumulative Supplement to Florida Statutes, 1941.

Investments of their reserve funds seem to be required of domestic insurers (section 626.04, Florida Statutes, 1941), and foreign insurers (sections 626.05 and 626.06, Florida Statutes, 1941), part of which may be mortgage loans upon improved and unencumbered real property. There is no requirement that such investments be made within or without this state. It, therefore, seems that the Legislature of this state considers the making of investments of legal reserve funds a part of the general business of an insurance company. Acts which are merely incidental to and properly connected with a licensed business, occupation or privilege may be performed under one license (37 C. J. 244, Section 104). Where a license is granted to do a general business, another license should not be imposed

for doing particular acts constituting an integral part of such business (37 C. J. 210, Section 62), in the absence of express statutory authority. The investment of the funds of an insurance company is as much a part of its insurance business as the writing of insurance; the investment of such funds is a necessary incident to the operation of a modern insurance business. (*Bankers Life Insurance Company v. Horsfall*, 48 S. D. 629, 205 N. W. 714, text 716; *John Hancock Mutual Life Insurance Company v. Lookingbill*, 218 Iowa 373, 252 N. W. 604, text 612 and 613; *Metropolitan Life Insurance Company v. Whitestone Management Company*, DC Ill., 8 Fed. Supp. 516, opinion affirmed, CCA 7th., 77 Fed. 2d. 255, text 259, certiorari denied, 296 U. S. 632, 56 S. Ct. 155, 80 L. Ed. 449; *Prudential Insurance Company v. Richman*, 292 Ill. App. 261, 11 N. E. 2d. 126, text 131.)

In the light of the cited statutes and authorities, I am of the opinion that any insurance company licensed to do business in this state, under sections 205.43, 205.44 and 205.44-1, 1945 Cumulative Supplement to Florida Statutes, 1941, may do a mortgage loan business within this state without obtaining a license under section 205.58, Florida Statutes, 1941. The license under sections 205.43, 205.44 and 205.44-1, supra, appears to give the licensed insurance company authority to establish district offices within the state without obtaining additional licenses.

Section 205.58, Florida Statutes, 1941, requires a license of every person, whether acting as owner, agent, broker or otherwise, who loans intangible personal property. This would seem to require licenses of agents or brokers of insurance companies making mortgage loans for such companies in this state. The business of acting as agent or broker, for an insurance company in making mortgage loans on real property in this state, is made the subject of a license tax. The mere fact that an insurance company may be exempted from obtaining a license under section 205.58, because it holds a license under sections 205.43-205.44-1, does not exempt its agent or broker. Such agent or broker is required to obtain a license under section 205.58 in order to make mortgage loans for an insurance company as such agent or broker, unless such agent or broker is otherwise exempt from such license by reason of some statute of this state.

January 18, 1947.—047-52.

#### NONRESIDENT INSURANCE AGENT—LIABILITY FOR TAX

**QUESTION:** Is a foreign life insurance company which is qualified to engage in business in this state, and which has a Florida licensed non-resident agent who lives outside this state and who solicits business for said insurer in this state by correspondence through the media of interstate channels, required to pay a county license tax for such agent under the provisions of section 205.45, Florida Statutes, 1941, as amended?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

While the information accompanying this request for opinion is silent upon the point, it is assumed that this insurer is complying with the requirements of section 635. 21, Florida Statutes, 1941, with respect to Florida business acquired for it by this nonresident agent.

In my opinion, the question is answered as follows:

Under the factual situation found in the question, it appears that the insurer is not required to pay a county license tax for such agent in Florida.

April 16, 1948.—048-129.

#### OCCUPATIONAL LICENSE—MUNICIPAL TAXATION OF INSURER

**QUESTION:** May a municipality in this state levy and enforce an occupational license tax against an insurer, duly licensed to do an insur-

ance business in this state, who maintains no office or place of business within such municipality but who writes insurance or renewals upon property within such municipality by mail?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

It does not appear from the said request for opinion whether the insurance business in question is interstate or intrastate business; however, as it is stated in the request that the insurer is licensed to do business in this state, I presume that the business in question is being done with an office or place of business of the insurer in this state. This opinion will make no attempt to deal with the question of interstate commerce.

Insurance companies doing business in this state are subject to a state license tax under sections 205.43, et seq., Florida Statutes, 1941, as amended, none of which statutes seem to expressly prohibit taxation by counties and municipalities. Section 205.02, Florida Statutes, 1941, expressly authorizes municipalities to levy a municipal occupational tax equal in amount to fifty per cent of the state occupational taxes "except where otherwise provided by law."

Most of the municipalities of this state have charters granted by special acts of the Legislature or special statutory provisions relating to taxation and other subjects. This being true, no opinion may be framed that will be applicable to all municipalities upon the question of what they may or may not tax. Where an insurance business is being done by mail, I would have to be advised in detail of the method of doing such business before I would be able to advise whether the business was being done in the municipality in question, or in some other place. The question of whether the mails were being used as the agent of the insurer or of the insured might be material. Whether the insurance contract is closed where the insured resides, or where the insurer is, might also be material.

In the light of the foregoing observations, it does not seem possible, with the information at hand, to form an answer to the question, or if an answer were attempted, it would be of such general nature as to be of no benefit.

October 13, 1947.—047-342.

#### DEALERS IN LIQUEFIED GAS—OCCUPATIONAL LICENSES FOR LIQUEFIED GAS DEALERS

**QUESTION:** Were the provisions of chapter 205, Florida Statutes, 1941, which may have required occupational licenses of dealers in liquefied petroleum gas, manufacturers of appliances and equipment for using such gas, and persons installing such appliances and equipment, repealed or otherwise affected by chapter 24302, Laws of Florida, acts of 1947?

*To Honorable C. M. Gay, State Comptroller:*

Under section 205.01, Florida Statutes, 1941, "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or other law of this state" unless a proper license be procured from the tax collector, the state comptroller or the state treasurer as the case may be. Section 205.13, of said statutes, provides that "fees and licenses paid to any board, commission or officers for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational tax required."

Chapter 24302, Laws of Florida, acts of 1947, as expressed in its title, provides "for the licensing and regulating of dealers in liquefied petroleum gas, manufacturers of appliances and equipment for the use of such gas, and persons installing such appliances on the premises of the ultimate consumer of such gas." The license tax, under this law, is paid to the state



treasurer, as state fire marshal, and the licenses thereunder are payable to him. Such licenses are issuable upon the application of the licensee, the payment of the required fee and the posting of a surety bond in the sum of twenty-five thousand dollars or the filing of evidence showing the procuring of public liability insurance in the same sum. The bond or insurance seems to be required as a protection to the public. All license fees collected are paid into the general revenue fund of the state and become a part thereof. No examination or evidence of qualification appears to be required of one seeking a license under this act. The license is "to engage in one or more of" the aforementioned occupations or businesses. The license is required annually with a half-year license being issued under proper circumstances for half of the license fee. The act contains no repealing clause, general or otherwise. Although the act authorizes the adoption of rules and regulations applicable to the sale and use of liquefied gas, such rules are made applicable to all persons, not merely licenses under the act. The license fee and its use under this act appears to be used for revenue purposes and not for the purpose of registration, examination, inspection or other regulatory purposes.

Although it is a rule of statutory construction that repeals by implication are not favored and should be evidenced by a clear intent to repeal on the part of the Legislature (*American Bakeries Company v. Haines City*, 131 Fla. 790, 180 So. 524; *State v. Keller*, 133 Fla. 335, 182 So. 779), it is also a rule that taxing statutes are construed strictly against the taxing power and in favor of the taxpayer (*Lee v. Wood*, 126 Fla. 104, 170 So. 433; *Lovett v. Lee*, 141 Fla. 395, 193 So. 538), and where such a statute is susceptible of two constructions, the one most favorable to the taxpayer should be adopted (*Walgreen Drug Stores v. Lee*, ..... Fla. ...., 28 So. 2d. 535).

When the foregoing rules of statutory construction are applied to the statutes and laws, I am of the opinion that the tax imposed by chapter 24302, Laws of Florida, acts of 1947, is an occupational license tax and not a fee to provide for the regulation of a business or profession; that no other license is required to permit such licensee from doing business within the state.

I am, therefore, of the opinion that the question should be answered in the affirmative; however, attention is directed to section 205. 02, Florida Statutes, 1941, which provides that "in every case, not otherwise provided by law, a county license tax of fifty per cent of the state license tax" may be imposed "and the tax collector . . . shall collect such county license tax."

June 21, 1948.—048-208.

#### DEALER IN LIQUID GAS APPLIANCES—LICENSE FOR EACH PLACE OF BUSINESS

**QUESTION:** Where a dealer in appliances for use of liquefied petroleum gas, as defined in and contemplated by chapter 24302, Laws of Florida, acts of 1947, has more than one place of business in this state, is the license tax required of such dealer by chapter 24302 payable for each separate place of business?

*To Honorable J. Edwin Larson, State Fire Marshal:*

In opinion No. 047-342, I held that the license tax required for the various businesses described in said chapter 24302, is an occupational license tax and not a fee to provide for the regulation of a business or profession. In view of such holding, in my opinion the question is properly answered in the affirmative; that is to say, that where a dealer in appliances for use of liquefied petroleum gas, as contemplated by said chapter 24302, has more than one place of business in this state, the license tax required of such a dealer by chapter 24302 is payable for each separate place of business.

June 22, 1948.—048-217.

#### TRANSFER OF TRUCK PERMIT—DEALERS IN LIQUEFIED GAS

**QUESTION:** May a duly licensed dealer in liquefied petroleum gas, under chapter 24302, Laws of Florida, acts of 1947, transfer to another person an annual permit issued to such licensee for one of his distributing trucks, without the consent of the state fire marshal, such permit being required by regulation of said officer?

*To Honorable J. Edwin Larson, State Fire Marshal:*

Chapter 24302 is an act providing, among other things, for the licensing and regulating of dealers in liquefied petroleum gas. Section 5 of chapter 24302 authorizes the state fire marshal to make, promulgate and enforce regulations concerning the matters dealt with in such act to the extent set forth in said section. The state fire marshal heretofore promulgated the following regulation:

"Filling containers: All Liquefied Petroleum Gas dealers shall secure in addition to license an annual permit for each of the distributing tank trucks or any bulk tank used in dispensing gas, he may have in use on the highways; the number of the permit shall be painted on the tank and the driver shall carry at all times, when driving such a vehicle, a copy of the permit."

This opinion is not concerned with the legal propriety of such regulation; for the purposes hereof, the authority and validity of such regulation is assumed, and this opinion is conditioned upon such assumption.

Generally, it may be stated that a license is a right or permission granted by duly designated authority to carry on a business or do an act which, without such license would be illegal. (53 C.J.S. 445, section 1.) The words "license" and "permit" are often used in this connection synonymously. (53 C.J.S. 445, section 1; *State vs. Stein*, 130 Fla. 517, 178 So. 133; *Harry E. Prettyman, Inc. vs. Florida Real Estate Commission*, 92 Fla. 515, 109 So. 442, 445.) It is the general rule that a license may not be transferred unless the license statute or ordinance provides otherwise. (53 C.J.S. 657, section 45.) Certain licenses or permits issued in pursuance of Florida laws are transferable upon proper application to designated officials (e.g., sections 205.43 and 320.32, Florida Statutes, 1941); or the law providing for license may specifically state it is not transferable (e.g., section 207.04, Florida Statutes, 1941). The regulation with which we are concerned has no provision for transfer, with or without the consent of the state fire marshal.

In view of the foregoing, in my opinion the question is properly answered as follows:

Under the provisions of the noted regulation, and the apparent legal rule stated, it would seem that a permit issued to a dealer in liquefied petroleum gas for one of his distributing trucks may not be transferred to any other person, firm or corporation, without the consent of the state fire marshal. Grave doubt exists that a license or permit issued under a law or ordinance may be transferred with the consent of the issuing authority unless such is specifically provided in the law or ordinance; hence, doubt exists that the regulation, in its present form, contemplates assignment of such a permit even with the consent of the state fire marshal.

July 29, 1947.—047-227.

#### LIQUEFIED GAS—MUNICIPALITY—REGULATION

**QUESTION:** Is a municipality engaged in the business of the sale and distribution of liquefied petroleum gas, the sale of equipment and appliances for the use of such gas, and/or the installation of such equipment and appliances to or for ultimate consumers of such gas residing out-

side the boundaries of such municipality, subject to the regulatory provisions of chapter 24302, Laws of Florida, acts of 1947, with respect to such business activities so conducted outside the municipal limits?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Said chapter 24302 provides for the licensing and regulating of dealers in liquefied petroleum gas, manufacturers of appliances and equipment for use of such gas and dealers in such appliances and equipment, and persons engaged in the installation of such appliances and equipment. Section 1 (2) of said chapter, defines "Person" as used in said act as meaning "Every natural person, firm, copartnership or corporation."

It appears to be the general rule that the word "corporation" used in a statute is not to be construed as including municipal corporations, unless the context of the statute indicates such intent, (e.g., *City of Webster Groves vs. Smith*, 102 S.W. 2d 618, 34 Mo. 798; *Wilcox vs. City of Idaho Falls*, (D.C. Idaho), 23 F. Supp. 626; *City of Los Angeles vs. Eighth Judicial District Court*, Nev. 67 P. 1019). A study of the subject in *Words & Phrases*, Vol. 9, pp. 712-719, and cases cited, evidences a lack of uniformity in construing the term as applied to municipalities. In the case of *City of Lakeland vs. Amos*, 106 Fla. 873, 143 So. 744, the court held that the words "all corporations, firms and individuals," used in the title of chapter 15658, Laws of Florida, acts of 1931, were sufficient to comprehend all corporations, firms and individuals, "including municipalities," as described and mentioned in the first section of such act. However, such case is not here construed as in derogation of the general rule mentioned above.

In view of the foregoing, in my opinion the question is answered as follows:

(a) While the weight of authority would seem to indicate that the word "corporation" as used in section 1(2) of said chapter 24302 is not to be construed as including municipal corporations, and while such is my opinion, it is recognized that only a court construction in a proper case raising the point can definitely settle the question.

(b) Granted that a municipality is not included in the definition of those persons subject to the licensing and regulatory provisions of said chapter 24302, as far as said act is concerned it would appear to be immaterial whether the municipality engages in all or any of such several businesses within or without its corporate limits. It is remarked, however, that the power of a municipality to engage in such business outside its boundaries is a question not here considered.

May 22, 1947.—047-139.

#### MUSCULAR DEVELOPMENT—EDUCATION—REGULATION

QUESTIONS: 1. What occupational license is required of those practicing the profession of re-education in muscular development and corrective exercises?

2. Does the practice of muscular development and corrective exercises fall within the jurisdiction of any state board regulating a profession and requiring an examination?

*To Honorable C. M. Gay, State Comptroller:*

The practice of re-education in muscular development and corrective exercises, as the same appears from request for opinion and from correspondence with the tax collector before whom the question arose, appears to be within the purview of section 205.52, Florida Statutes, 1941, and a license should be required thereunder.

It appears from the correspondence in the file that the person in question treats muscular conditions due to paralysis, fractures, disloca-

tions and other injuries or diseases where the muscles are affected. The purpose and intent of the treatment appear to be the restoring of the muscles to normal conditions. The treatment appears to be primarily one of exercising the sore or defective muscles, and may include massaging the muscles. Some treatments appear to be after discharge by the patient's doctor, others may be under the direction of the patient's doctor, and some may be of patients who have not had medical treatment and who are not and never have been under a doctor's care. The definitions of the practice of the several branches of medicine in this state are rather broad (see sections 458.13, 459.08, 460.11 and 480.01, Florida Statutes, 1941). Some of them may include some of the treatments indicated in the correspondence.

Although sections 456.20, 460.12, 463.07 and 475.13, Florida Statutes, 1941, require that persons practicing certain professions obtain a license or permit from the proper professional board or commission as a prerequisite to obtaining a license under chapter 205, only two of these statutes require that such license or permit be exhibited before the tax collector as a prerequisite to the issuance of an occupational license under chapter 205. Even in such cases, he is only required to demand the same when the application is for an occupational license to practice that profession. The issuance of an occupational license by a tax collector, will not prevent the regulation, by the proper board or commission, of the services or work to be done and performed, if within a regulatory statute.

I am of the opinion that no definite answer should be made to the second question in the absence of a request from some board or commission regulating some branch of the practice of medicine. Unless the application is for a license to practice one of the professions regulated by statute, the tax collector should not refuse to issue the license but should advise that the applicant apply to one or more of the medical boards of this state to ascertain whether or not the services or work done by the applicant is within the purview of the regulatory statute enforced by such board or commission. In this case, the applicant should be directed to contact the Board of Medical Examiners (chapter 458, Florida Statutes, 1941), the State Board of Osteopathic Medical Examiners (chapter 459), the Florida State Board of Chiropractic Examiners (chapter 460), the State Board of Naturopathic Examiners (chapter 426), and the Board of Massage Examiners (chapter 480), as the services and work done and performed, as described in request for opinion might be within the purview of the statutes regulating one or more of such professions. I, therefore, answer the second question by stating that the practice described in said question may be within the purview of one or more of the medical statutes, but that request should be made to such boards for a final determination of this question, which board has the right to apply to the attorney general for his opinion if found necessary.

July 19, 1948.—048-232.

#### OCCUPATIONAL LICENSE—BLOOD PRESSURE READINGS

**QUESTION:** Under what section of the statutes of this state should an occupational license be required of persons holding themselves out to the public for the taking of blood pressure, by the use of a baumanometer, and advising their clients of their systolic and diastolic blood pressure for a fee?

*To Honorable C. M. Gay, State Comptroller:*

It appears from the request for opinion and the file of the comptroller furnished therewith that the person in question uses the baumanometer for the taking of both systolic and diastolic blood pressure reading for the public for a fee and that he does nothing else in this connection other than furnish the said readings. Where the person taking blood pressure, as aforesaid, answers questions and expresses opinions concerning such blood pressure he would seem to be practicing medicine without a proper license



under the statutes of this state. From a practical standpoint it would doubtless be difficult, if not impossible, to avoid answering questions in connection with the taking of blood pressure as aforesaid.

One taking systolic and diastolic readings of blood pressure in human beings must have sufficient technical knowledge of the instruments being used by him and of the human body to enable him to make the readings necessary for the taking of such blood pressure. He must have some technical knowledge of the subject of blood pressure and the use of instruments from which such readings are made. Section 205.52, Florida Statutes, 1941, requires that "every person engaged in the practice of a profession . . . shall pay a license tax . . . for the privilege of practicing."

I am inclined to think that the Legislature, when it enacted section 205.52, intended that the same be broad enough to include the taking of blood pressure as aforesaid and the furnishing of readings thereof to clients. I think that such taking of blood pressure and furnishing of readings thereof should be licensed as a profession under said section 205.52. (See definitions of "professions" in 34 Words and Phrases, 201 et seq.)

Because of the provisions of chapter 24352, Laws of Florida, acts of 1947 (section 205.05-1, Cumulative Supplement to Florida Statutes, 1941), the tax collector should require that the applicant produce before him a certificate or license as required by said section 205.05-1.

October 30, 1947.—047-365.

**PRACTICE OF MEDICINE—LICENSE TO PRACTICE MEDICINE—  
ISSUANCE OF LICENSE**

**QUESTION:** Does chapter 24352, acts of the Legislature of 1947, apply to dentists?

*To Honorable J. J. Milton, Tax Collector, Hamilton County, Jasper, Florida:*

Section 1, chapter 24352, acts of 1947, is as follows:

"From and after the passage of this Act it shall be unlawful for the Tax Collector of the several Counties of the State of Florida to issue State and County occupational licenses to any persons applying for license to practice medicine in any of its branches unless and until proof of current qualification and competency, as established by certificate or license issued by State Boards duly constituted and legally authorized to determine qualification and competency, be exhibited at the time of making such application."

It will be seen that the purpose of this act is to protect the interests of the public health and safety, and the Legislature had this in mind when it used the term "to practice medicine," and to carry out this intent, it, in my opinion, used the term in its broadest sense. Construing the term "practice medicine in its broadest sense," the practice of dental surgery is included therein. (See "Words and Phrases," Dentists and Dentistry, and Medicine.)

Therefore, the question should be answered in the affirmative.

March 18, 1948.—048-99.

**OUTDOOR ADVERTISING PERMIT—OCCUPATIONAL LICENSE—  
STATE ROAD DEPARTMENT**

**QUESTION:** Where a person holds a license or permit from the outdoor advertising division of the State Road Department, under chapter 479, Florida Statutes, 1941, is he relieved from paying the state and county occupational license under chapter 205, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

Section 479.04, Florida Statutes, 1941, provides in part as follows: "The fees for such license, hereby imposed for revenue for the use of the state, shall be seventy-five dollars per annum for persons or corporations operating under this chapter in one to eight counties and two hundred dollars per annum for those operating in more than eight counties, payable in advance, and fifteen dollars per annum, payable annually in advance, for the use of the county, in each and every county within the state in which licensee shall engage or continue in the business of outdoor advertising as aforesaid." Section 479.14 provides that the state taxes collected under section 479.04 shall be paid into the state treasury "and allocated to the state road department for use in the administration of this chapter and in the construction and maintenance of roads."

It clearly appears from the quoted provisions contained in chapter 479, Florida Statutes, 1941, that the license under said chapter was intended as a revenue measure and not merely as a regulatory measure, although the chapter would seem to accomplish both purposes.

I am, therefore, of the opinion that the license required by section 479.04 is not within the purview of section 205.13, Florida Statutes, 1941, and that the question should be answered in the affirmative.

May 11, 1948.—048-157.

#### OUTDOOR ADVERTISING—VEHICLES OPERATED WITHIN CORPORATE LIMITS

**QUESTION:** Under the provisions of chapter 479, Florida Statutes, 1941, designated as the outdoor advertising law, are persons operating buses, taxicabs and other vehicles for the purpose of transporting passengers within the limits of a municipality, required to secure a permit and license as a prerequisite to the displaying of advertising signs for compensation within or upon such vehicles?

*To Honorable F. Elgin Bayless, Chairman, State Road Department,  
Tallahassee, Florida:*

The chairman of the State Road Department, as the administrative officer of the outdoor advertising law, is without authority or jurisdiction to regulate, whether by imposition of license fees, permit fees, or in any other manner, the display of outdoor advertising signs within the corporate limits of any city or town.

No person engaged in the operation of buses, taxicabs, or other vehicles for the transportation of passengers within the corporate limits of any city or town or the territory adjacent thereto, within which such person may by law be authorized to operate, may be required to secure a license or permit under the provisions of chapter 479, Florida Statutes, 1941, (outdoor advertising law), as a condition to his right to exhibit or display advertising signs upon or within such vehicles.

Section 205.20, Florida Statutes, 1941, imposes a license tax upon every person renting for profit advertising space in or on any boat, car, bus, truck, or other vehicle. The cited section, however, is not administered under the provisions of the outdoor advertising law. The question is accordingly answered in the negative.

June 16, 1948.—048-198.

#### OCCUPATIONAL LICENSES—RENTAL OF BOATS, CHAIRS, UMBRELLAS

**QUESTION:** Under what section or sections of the statutes of this state should state and county occupational licenses be issued to persons

having rubber boats, beach chairs, beach umbrellas, cabanas and sand sailers, in this state for rent to persons to be used on or near ocean and other beaches in this state?

*To Honorable C. M. Gay, State Comptroller:*

An examination of the statutes of this state indicates that there are three statutes under which it might be possible to classify such licenses. Section 205.21, Florida Statutes, 1941, relates to the licensing of persons who operate "for profit any game, amusement or recreational device, contrivance or facility not otherwise licensed by some other law of this state." Section 205.53 of said statutes relates to the licensing of persons "engaged in any business, as owner, agent or otherwise, that performs some service for the public in return for a consideration." Section 205.49 of said statutes applies where the business in question may not be classified under some other section of said statutes.

Laws relating to license taxes, and providing a penalty for doing business without a license, are penal and as such should be strictly construed (Texas Company v. Amos, 77 Fla. 327, 81 So. 471), in favor of the citizens and against the government (53 C. J. S. 495, section 13). Public service may be defined as supplying some commodity or service to the general public (Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593, text 597). Doubtless any person renting beach chairs, umbrellas, boats and cabanas to persons using the beaches is performing a service to the general public so as to permit his classification under section 205.53 unless the said instruments may also be classified as game, amusement or recreational devices, contrivances or facilities under section 205.21. Said section 205.21 seems to relate to any person "who operates for profit any game, amusement or recreational device, contrivance or facility not otherwise licensed by some other law of this state." The word "operate" seems to be a word indicating action and suggests some act of direction or superintendence (29 Words and Phrases 537 et seq.). If operated for game, amusement or recreational purposes they would seem to be so operated by the persons who rent them from their owner and not by their owner. Whether or not the devices in question are being operated by their owner as game, amusement or recreational purposes for profit is a question of fact to be determined by the tax collector when he issues the license.

Upon the making of an application for a license the tax collector should, from the evidence available determine whether the devices in question are being operated by the applicant for game, amusement or recreational purposes, and if so they should be licensed under section 205.21, but if not they should be licensed under section 205.53—if furnished the public as a public service for a consideration. If they are found to come under neither of said sections they should be licensed under section 205.49. This seems to answer the question. The question involves the determination of questions of fact which must be ascertained and determined by the tax collector when issuing the license, such determination to be made under the rules above set out.

July 8, 1948.—048-228.

DANCE HALL LICENSE—RECREATION CENTER AS  
"DRAWING CARD" FOR CAFE

QUESTION: A cafe operator, selling no liquor, desires to conduct a recreation center where dancing is conducted and operate same without charge; such recreation center to be in a building apart from the cafe. He desires to place a "juke box" in the center for furnishing the music, or place said box in a window in the cafe to furnish music for such dancing. Under these conditions, will he be required to obtain a license as provided by section 205.37, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

If the tax collector charged with the duty of collecting such licenses finds upon investigation that the recreation center in question is not used in connection with, or as a "drawing card" for the said cafe and no charge is made for dancing or for the music furnished therefor, either directly or indirectly, then no license would seem to be required under said section of the statute. If, however, he finds that it is so situated and conducted as to indicate that it was established in connection with, or as a drawing card for, said cafe; then if dancing is permitted in such a center a license agreeable to said section of the statute should be required. (See *Mouchas v. Stoutamire*, 148 Fla. 373, 4 So. 2nd 459; *Levy v. Collins*, 143 Fla. 619, 197 So. 522; *Pellicer v. Sweat*, 131 Fla. 60, 179 So. 423.)

Where a juke box is placed in a recreation center where dancing is permitted, or so close thereto that music therefrom is sufficient for dancing, which box any person may play by depositing a coin therein, and this is the only music available for dancing in such recreation center, a license for conducting such dancing place should be required under said section of the statutes (See *Mouchas v. Stoutamire*, supra).

June 2, 1947.—047-149.

#### VETERANS—DANCING—VENDING MACHINES

QUESTIONS: 1. Does the occupational license tax exemption for disabled veterans under section 205.16, Florida Statutes, 1941, exempt such veterans from the payment of the license tax required to be paid by section 205.37 of such statutes by every person who operates for profit any place where dancing is permitted?

2. Does the occupational license tax exemption for disabled veterans by section 205.16, Florida Statutes, 1941, give such veteran an exemption for each vending machine for which a license is required under section 205.63 of such statutes, or is such veteran entitled to one exemption, irrespective of the number of such machines operated by him?

*To Honorable C. M. Gay, State Comptroller:*

(1) The Supreme Court of Florida has held that the exemption from occupational license taxes accorded all confirmed cripples, deaf and dumb persons, invalids, etc., by section 205.15, Florida Statutes, 1941, is not applicable to a person who applies for a license to operate a place where dancing is permitted under section 205.37. (See *State vs. Wentworth*, 185 So. 357.) It would seem that the reasoning advanced in that case would also embrace disabled veterans; therefore, so long as the supreme court adheres to the conclusion reached in such case, I have no alternative but to answer this question in the negative. (See also *Pellicer vs. Sweat*, 197 So. 423.)

(2) It is apparent that question 2 was prompted by the idea that each vending machine is a separate business and that, consequently, the occupational license tax exemption applies to each vending machine. Obviously, the result of such a construction would mean that a disabled veteran would not be required to pay any tax under section 205.63, irrespective of the number of vending machines he might be operating. I do not believe that the Legislature intended any such result.

It appears to me that the \$50.00 exemption is for the disabled veteran who operates a vending machine or vending machines and that any time he operates a sufficient number of machines so that the total amount of the tax under section 205.63 exceeds \$50.00, it would be incumbent upon him to pay the amount of the tax in excess of the \$50.00 exemption. In both the request for opinion and its attachment, reference is made to a "vending machine" and in answering this question I assume that you have in mind the "merchandise vending machine" included in section 205.63.



March 22, 1948.—048-101.

### MINIATURE AUTOMOBILES—RACE COURSE—AMUSEMENT LICENSE

QUESTIONS: 1. Where a person establishes and operates for profit in this state a race course for miniature motor fuel propelled vehicles—such vehicles being facsimile miniatures of automobiles measuring from eight to twelve inches in length—is such race course an amusement device within the purview of section 205.21, Florida Statutes, 1941?

2. Where the miniature motor vehicles operated upon and over such race course are not owned by the owner and operator of the race course, but are permitted to operate upon and over such race course for a fee, are such miniature motor vehicles also amusement devices within the purview of said section 205.21?

*To Honorable C. M. Gay, State Comptroller:*

Section 205.21, Florida Statutes, 1941, provides in substance that “every person who operates for profit any game, amusement or recreational device, contrivance, or facility . . . shall pay a license tax . . .” It appears from the request for opinion that the race course in question will be set up and operated for the amusement or recreation of the public for a fee. Evidently each miniature vehicle operated upon the race course will be propelled by a miniature motor operated by gasoline or other like fuel and the said vehicle will race against the time made by other vehicles over the course in a certain distance. The race course when so operated for a fee seems to be clearly an amusement or recreational device, contrivance or facility (3 Words and Phrases 372; 36 Words and Phrases 585; 3 C. J. 1060; 53 C. J. 659), within the above statute. This seems to answer the first question in the affirmative, unless the method of operation brings it within the purview of either section 205.31, 205.32 or 205.60, Florida Statutes, 1941.

The race course without the miniature vehicles to operate upon and over it would be of little value as an amusement or recreational device, contrivance or facility; and a miniature vehicle so constructed to be operated upon such a race course would likewise be of little value as such a device, contrivance or facility without the race course. I am considering here only miniature vehicles constructed to operate upon race courses similar to those aforementioned; however, it would seem to be possible to so construct and operate such a miniature vehicle as to make it an independent amusement or recreational device, contrivance or facility and subject to the license taxes mentioned in section 205.21, Florida Statutes, 1941, but this would be a question of fact to be determined in the first instance by the tax assessor. We are here confronted with the question of a miniature race course upon which miniature vehicles are operated, owned either by the owner and operator of the race course or by other persons, for the purpose of amusement or recreation. Under these circumstances it would seem that the miniature vehicles, although owned by third persons, together with the race course, constitutes a single facility and not two or more facilities. It, therefore, appears that the second question should be answered in the negative, unless the miniature vehicles are operated from the race course as a separate facility.

February 3, 1947.—047-25.

### VETERAN EXEMPTION—HOTEL COMMISSION LICENSE

QUESTIONS: 1. Are veterans of Spanish American War, and World Wars I and II, exempt from payment of State Hotel Commission license fee?

2. If the answer is in the affirmative, does such exemption apply to veterans not disabled as well as veterans who are disabled?

3. Is the license issued by the State Hotel Commission in return for fees collected, an occupational license or an inspection and supervision license?

*To Honorable J. Lee Ballard, State Hotel Commissioner:*

In various opinions announced by me and by my predecessors in office construing chapter 13876, Laws of Florida, acts of 1929, and amendments thereto, now compiled as section 205.16, Florida Statutes, 1941, granting exemption to disabled veterans of the Spanish American War, and World War I and World War II, the recited statute has been interpreted to provide for the exemption of disabled war veterans from the payment of occupational tax or occupational licenses which are levied for the purpose of raising revenue for state or county purposes.

Section 511.06, Florida Statutes, 1941, imposes a license fee upon the privilege of operating a hotel, rooming house or apartment house, which fee is required to be paid to the hotel commissioner before a license is issued.

The statute provides that all such license fees shall be paid to the hotel commission, and further provides that the only appropriation for the maintenance of the hotel commission shall be such amounts as are actually collected by the commissioner.

Section 205.29, Florida Statutes, 1941, imposes an occupational license tax upon persons engaged in the business of operating a hotel, boarding house, etc.

Section 205.13, Florida Statutes, 1941, provides that fees or licenses paid to any board, commission or officer for permits or other regulatory purposes shall be in addition to and not in lieu of occupational license tax imposed by law.

The license fees imposed by section 511.06 are not occupational license taxes.

Question 1 is accordingly answered in the negative, which disposes of the necessity of answering questions 2 and 3.

December 17, 1947.—047-436.

#### VETERAN LICENSE EXEMPTION—EXEMPTION IN SEVERAL COUNTIES

QUESTIONS: 1. Does section 205.16, Florida Statutes, 1941, as amended, entitle disabled war veterans to a credit of fifty dollars on the state, county, and municipal license required of them or are they entitled to a credit of fifty dollars upon each license?

2. Where a license is required of such disabled war veterans in more than one county or municipality, are they entitled to credit only in their home county or municipality, or may they also receive credit in other counties and municipalities?

*To Florida Structural Pest Control Board, Gainesville, Florida:*

The first question appears to have been answered by an opinion of this office rendered on October 17, 1946 (see 1946-1947 Biennial Report, page 350).

Subsection (4) of said section 205.16, Florida Statutes, 1941, answers the second question. Under this subsection no license under the section may be "issued in any county other than the county wherein the veteran is a bona fide resident citizen elector, unless such veteran applying therefor shall produce to the collecting authority in such county a certificate of the tax collector of his home county to the effect that no exemption from license has been granted to such veteran in his home county under the authority of this section." When we review the history of this section of the statutes.

(see chapters 12110, 13876, 16299 and 17476, Laws of Florida, acts of 1927, 1929, 1933 and 1935), and the section itself in its entirety, it seems that the statute limits exemptions to one county at a time and to one business or profession at a time. The purpose and intent of the statute is to assist war veterans to make a livelihood in business or professions carried on mainly through their own personal efforts. This seems to contemplate only one place of business or profession.

September 17, 1947.—047-302.

TRAILER COACH DEALERS—LICENSE ON TRAILER DEALERS—  
LIMIT OF LICENSE

QUESTION: Is chapter 23665, Laws of 1947, which imposes a license tax on dealers in trailer coaches and vehicles not self-propelling, a valid and enforceable statute, or, how may its validity be tested?

*To Honorable John Kilgore, Motor Vehicle Commissioner:*

I note the inquiry with regard to the issuance of licenses under the provisions of the quoted statute, and particularly with regard to the question of the license period. Chapter 205, Florida Statutes, 1941, contains all of the statute of the state governing the issuance of licenses of every nature. Section 205.03 of this chapter provides that no license shall be issued for more than one year and all licenses shall expire on the first day of October of each year, except as otherwise provided by law. Section 205.04 of the chapter provides that all licenses shall be payable on or before the first day of October of each year unless otherwise provided by law, and except as may be otherwise provided by law, any person who was not liable for a license during the first half of the license year may be issued a license during the second half of the license year upon the payment of one-half the amount fixed as the price of such license for one year. The statute in question contains no provision contrary to the provision of the general law with respect to the period for which the license may be issued, nor with respect to the license year as established by general law. It is, therefore, clear that the license issued under chapter 23665 shall be issued annually and shall be of effect from the first day of October of each year to the first day of October of the ensuing year.

The inquiry with regard to the necessity of an agent's securing a license and the necessity for the posting of a bond as required by the act is answered by official opinion rendered on August 7, 1947. With reference to the meaning of various terms employed by the act in section 3 thereof, the act leaves it to the discretion of the motor vehicle commissioner as to what information must be furnished in support of application for license required. However, that certain information must appear in the written application. The term "statement of liability, if any" is apparently designed to satisfy the motor vehicle commissioner that the applicant is a bona fide dealer in trailer coaches and not merely a peddler. The language of section 5 is interpreted to mean that money collected as license fees shall be applied to the expense of carrying into effect the provisions of the act by the motor vehicle commissioner, and in the event there shall be a surplus after such purpose has been fulfilled, the same shall become a part of the revenue collected by the motor vehicle commissioner constituting the motor vehicle expense fund.

The penalty for a violation of any of the provisions of the act is the penalty prescribed by the general law of the state for the commission of a misdemeanor. With regard to the question as to whether the provisions of the act are discriminatory, burdensome or unreasonable, this is a matter entirely for judicial interpretation and can only be resolved by judicial opinion.

I trust this is the information requested. The act should be put into effect, and any question as to its enforceability should be raised by some person whose interest is affected by the legislation.

February 24, 1947.—047-59.

#### PARTNERSHIP—EXEMPTION FROM TAXES

**QUESTIONS:** 1. Where two or more persons, within the purview of section 205.15, Florida Statutes, 1941, enter into a partnership, with not more than one employee or helper, using their own capital only, not in excess of the sum of five hundred dollars each, is such partnership entitled to exemption from license taxes under said section?

2. Where two or more persons, some of whom are within the purview of section 205.15, Florida Statutes, 1941, enter into a partnership, with not more than one employee or helper, and with the partners within the purview of said section contributing their own capital only, not in excess of the sum of five hundred dollars each, is such partnership entitled to any exemption under said section?

*To Honorable C. M. Gay, State Comptroller:*

Said section 205.15, Florida Statutes, 1941, provides that certain classes of persons, "with not more than one employee or helper, and who use their own capital only, not in excess of five hundred dollars, shall be allowed to engage in any business or occupation in counties in which they live without being required to pay for a license," with certain exceptions not here material. This statute was derived from section 1, chapter 20956, Laws of 1941. However, section 27, chapter 18011, Laws of 1937, contained the same provision with a capital limitation of three hundred dollars instead of five hundred. Prior laws only provided for exemption from a peddler's license (sections 1268 and 1279, Compiled General Laws, 1927, and section 995, Revised General Statutes, 1920). The statutes require that partnerships procure licenses (section 205.68, Florida Statutes, 1941).

Partnerships are not ordinarily regarded as legal entities distinct from the individuals composing them (47 C. J. 747, Section 172). They are neither natural nor artificial persons (*Williams v. Wilson*, 205 Ala. 119, 87 So. 549; *Abbott v. Anderson*, 265 Ill. 285, 106 N. E. 782); they are but a contractual status (*Allison v. Campbell*, Tex. Civ. App., 298 S. W. 523, 1 S. W. 2d. 866), or relation with no legal being apart from the members who compose them (*John Bollman Co. v. Bachman*, 16 Cal. A. 589, 117 P. 690, 122 P. 835). They are not persons or legal being separate from their members (47 C. J. 747, note 87).

A partnership or firm may be required to pay a single license tax upon its business or the members thereof may be taxed separately depending upon whether the tax is against the place of business or the engaging in the occupation, profession or business (37 C. J. 249, Section 115). Under some of the statutes a license is required for each place of business (see sections 205.29, 205.30, 205.48, 205.53, and 205.55, Florida Statutes, 1941, for examples), under others a license is required of each person engaged in certain occupations, professions or businesses (see sections 205.39, 205.41, 205.43 and 205.62, Florida Statutes, 1941, for examples), and under others, licenses may be required for both the place of business and for the persons engaged in certain occupations, professions or businesses (see section 205.52, Florida Statutes, 1941, for a possible example). Section 205.15 does not exempt a business merely because some person within its purview contributes five hundred dollars of capital to such business, but the business must be operated by such person with not more than one employee or helper; the mere contribution of funds to a partnership would not seem to be sufficient within itself.



The purpose of the statute in question was doubtless to aid and assist persons within its purview in becoming self-supporting and in aiding them so that they will not become public charges, to permit them to engage in the few occupations they are capable of following with as little overhead and expense as possible. The remission of the license tax fee by the statute is in the nature of public aid and assistance.

Businesses operated by partnerships of persons within the purview of the statute, where the combined capital does not exceed the sum of five hundred dollars, would seem to be clearly within the intent and purpose of the statute. I am of the further opinion that partnerships of such persons, where the capital contribution of each such person is not in excess of the sum of five hundred dollars, and there is no other capital, and each partner is actively engaged in the operation of the business, which business does not have more than one employee or helper (not one for each partner), is also within the intent and purpose of the statute. If there is additional capital used, either procured by loan or contributed by some partner, or some of the partners are not actively engaged in the operation of the business, I do not think that the partnership is within the intent and purpose of the statute.

From the foregoing, I am of the opinion that the first question should be answered in the affirmative and the second question in the negative.

November 16, 1948.—048-339.

#### AMUSEMENT DEVICES OPERATED BY VETERANS

**QUESTION:** Is an organization of veterans of foreign wars, who operate amusement devices to raise funds with which to construct a home for their organization, entitled to exemption from occupational license taxes usually applicable to such amusement devices?

*To Honorable C. M. Gay, State Comptroller:*

This appears to be a business operated by a war veterans' organization and not one operated by one or more disabled war veterans within the purview of sections 205.16 and 205.16-1, Florida Statutes, 1941. The business conducted does not appear to be one within any of the exemption provisions of sections 205.15, 205.17, 205.18, 205.19, Florida Statutes, nor any other provision of the general license tax laws of this state. The said organization is not a state agency as is the National Guard of this state. See opinions of this office dated July 1 and September 23, 1948 (Nos. 048-222 and 048-316.) The exemption granted to veterans' organizations by section 192.06 of the statutes relate to ad valorem taxes and has no application to occupational license taxes. It, therefore, appears that there is nothing in the statutes nor in the laws of this state granting exemption from occupational license taxes to such organization.

The organization of "Veterans of Foreign Wars of the United States" is a corporation under the statutes and laws of the United States (title 36, sections 111 to 120, United States Code), and it is presumed that the aforementioned organization exists pursuant to said statutes. There is nothing in the said federal statutes either authorizing or prohibiting the levy of license taxes against the said corporation. It has been held that a state may levy a tax against a corporation chartered by the federal government where the tax does not interfere in any substantial way with the performance of any federal function. (53 C. J. S. 470, section 6.) I am unable to see where a license tax as contemplated by the foregoing question would in any way interfere with the performance of any function of the federal government.

I am, therefore, of the opinion that the question should be answered in the negative.

## GASOLINE TAXES

January 18, 1947.—047-8.

## MUNICIPAL AIRPORTS—CHARGE ON GASOLINE

**QUESTION:** Under the provisions of chapter 22822, Laws of Florida, acts of 1945, is a municipality permitted to include in a lease of its airport—as part of the rentals, fees and charges payable to a lessor by lessee—a charge on a gallonage basis of gasoline used or sold by the lessee on said leased premises?

*To Mr. William Lazarus, Aviation Supervisor, Florida State Improvement Commission:*

Attached to the request for opinion is a form of lease of the nature mentioned which is stated to be typical. Article VI of this form sets forth the "rentals, fees and charges" payable by the lessee to the lessor as consideration for said lease. These are summarized as follows: (1) a stated sum per annum payable monthly; (2) a certain percentage of gross income in excess of a stated sum received by lessee in his operations, exclusive of gasoline, oil and airplane sales; and (3) certain cents per gallon on all lubricating oil used or sold in any calendar month, and certain cents per gallon, according to volume, on gasoline used or sold in any calendar month.

Chapter 22822, Laws of Florida, acts of 1945, imposed an additional tax of one cent per gallon on gasoline or other like products of petroleum, the proceeds thereof to be used as in said act provided. Section 13 of the act provides, among other things, "that no municipality or other political subdivision shall levy or collect any gasoline tax or other tax measured or computed by the sale, purchase, storage, distribution, use, consumption, or other disposition of gasoline or other like products of petroleum," it being provided, further, that nothing in the law should prevent the "levying by municipalities, or other political subdivisions, of reasonable flat license fees or taxes upon the business of selling gasoline or other like products of petroleum at wholesale or retail."

It is doubtful that lease rental payable to a municipality in the form of a charge on gasoline on a gallonage basis sold or used at a leased airport, as contemplated by the question, constitutes a "fee" or "tax" within the ordinary and accepted meaning of such terms. For discussion of the nature of a "fee" or "tax" (see *Stewart vs. Verde River Irrigation and Power Dist.*, 40 Ariz. 531, 58 P. 2d. 329; *Crawford vs. Bradford*, 23 Fla. 464, 2 So. 782; *State vs. Montague*, 34 Fla. 32, 15 So. 589; 51 Am. Jur., pages 46-48, Sections 12-15). Nevertheless, it is recognized that the probable effect of such a charge on gasoline on a gallonage basis so sold and used at an airport leased by a municipality, as a part of the lease rental may be the same, insofar as the public using and purchasing such product is concerned, as though the amount of such charge were a tax imposition.

In view of the foregoing remarks, in my opinion the question is properly answered as follows:

It is doubtful that proceeds derived by a municipality as a part of the lease rental from sale of gasoline on a gallonage basis sold or used at its leased airport is a "fee" or "tax" within the meaning of such words as used in chapter 22822. Nevertheless, it is apparent that the question presented is a controversial one which can definitely be settled only by the courts in a declaratory judgment or other appropriate proceeding instituted by an interested party.

October 13, 1947.—047-343.

## SHERIFF'S AUTOMOBILES—EXEMPTION FROM GASOLINE TAXES

**QUESTIONS:** 1. The sheriff's office in Dade county has just purchased two new automobiles; what procedure must be followed to obtain a refund of state tax on same?

2. If the sheriff's office buys gasoline and oil for use in its cars, would it be entitled to a deduction of the state tax on these commodities?

3. Are the deputy sheriffs in the civil and criminal departments of the sheriff's office entitled to a deduction of the state tax on gasoline and oil which they buy from the various filling stations for use in the automobiles operated by them?

*To Honorable Jimmy Sullivan, Sheriff, Dade County, Miami, Florida:*

The foregoing questions are answered in their numerical order as follows:

(1) There is no state tax on new automobiles and I believe if the sheriff's office paid any such tax it must have been a federal tax. A refund, if had, must be through federal officers.

(2) There is no state tax on oil such as mentioned in request for opinion. There is a state tax on gasoline but there is no law authorizing a deduction of this state tax even if the automobiles are used by the sheriff as stated.

(3) The answer to question two also applies to question three.

### EXEMPTION OF INDUSTRIAL PLANTS

January 28, 1947.—047-17.

#### INTANGIBLE PERSONAL PROPERTY—PORTION APPLICABLE

QUESTIONS: 1. Is a corporation which operates an industrial plant within the tax exemption provided by section 12, article IX, of the Florida Constitution, entitled to exemption from intangible personal property taxes upon its intangible personal property or any of it?

2. If the above question is answered in the affirmative, to what part or portion of such intangible personal property does such tax exemption extend?

*To Honorable C. M. Gay, State Comptroller:*

Unless expressly exempted from taxation under the laws of this state, intangible personal property having a situs in this state is subject to taxation. (Sections 192.01, 192.04, 199.02, 199.11, et seq., Florida Statutes, 1941.) There is no statutory exemption from intangible personal property taxation for industrial plants operating in this state. (See section 199.02(5), Florida Statutes, 1941, as amended.) Section 12, article IX, of the Florida Constitution, in brief, provides that "all industrial plants . . . engaged primarily . . . in the manufacture of steel vessels . . . shall be exempt from all taxation" for a period of fifteen years but not beyond the year 1948. The answers to the questions are to be found in a construction of the phrase "shall be exempt from all taxation."

The supreme court (*City of Jacksonville v. Continental Can Company*, 113 Fla. 168, 151 So. 488, text 489 and 490; *Steuart v. State*, 119 Fla. 117, 161 So. 378, text 379; *City of Jacksonville v. Glidden Company*, 124 Fla. 690, 169 So. 216; *Burnett v. American Welding and Tank Company*, 143 Fla. 470, 197 So. 458, text 462 and *Fleischer Studios v. Paxton*, 147 Fla. 100, 2 So. 2d. 293), has declared certain rules to follow in construing section 12, article IX, of the constitution and similar sections. The purpose of the exemption was to encourage and stimulate the construction and operation of industrial plants in this state. "Both ad valorem and excise or license taxes are included" in the exemption (*American Can Company v. City of Tampa*, 152 Fla. 798, 14 So. 2d. 203, text 209). "All" means every one, the aggregate, the whole, whole number of particulars, totality, every, etc. (3 Words and Phrases 133 to 142). "All taxes" has been held to include property taxes, inheritance taxes, succession taxes, and all other kinds of

taxes (Commonwealth v. A. Overholt and Company, 331 Pa. 182, 200 A. 849, text 852; In Re. F. G. Borden and Company, CCA Wis., 275 Fed. 782; and American Stores Company v. Boardman, 336 Pa. 36, 6 A. 2d. 826, text 829). "All" collectively designates the whole number of particulars, individuals or separate items; distributively, it may be equivalent to "each" or "every" (Black's Law Dictionary, 3rd. Ed. 94). (See also 61 C. J. 397, Section 398.)

The exemption in question applies to industrial plants engaged primarily in the manufacture of certain products, not to the ownership of such plants. Industrial plant seems to denote a place of business where labor and capital are employed (see State v. Smith, 342 Mo. 75, 111 S. W. 2d. 513; Appeal of Liggett, 291 Pa. 109, 139 A. 619). "Ordinarily, property belonging to an institution, which has been granted tax exemption, is not exempt from taxation unless such property is used for the purposes for which the institution was established, and this depends upon the facts pertaining to its use as shown in each individual case." (51 Am. Jur. 539, Section 539.) In the case of McHenry v. Alford, 168 U. S. 651, 18 S. Ct. 242, 42 L. Ed. 614, text 619, a statute provided for a special method of taxing "railroad property." The court said that "property owned by a railroad" may not be "railroad property" within the meaning of the act; "the two are not equivalent terms." "Railroad property" was held to be property necessary to the conduct of the railroad business.

In the light of the foregoing authorities, I am of the opinion that the owner of an "industrial plant" entitled to tax exemption under the state constitution is entitled to exemption from intangible personal property taxes upon such of its intangible personal property as is used and employed in connection with the operation of such industrial plant. This seems to answer the first question.

Ownership of intangible personal property by the owner or operator of such an industrial plant is not enough to entitle such intangibles to exemption; such property must be used and employed in connection with, and as a part of, the operation of the industrial plant in question. Whether such property is used in connection with the operation of the industrial plant in question will depend upon the facts pertaining to the use as shown in each individual case, which is a question of fact. This seems to answer the second question.

March 19, 1947.—047-85.

#### TEXTILE PLANTS—RAMIE PRODUCTION

**QUESTION:** Are ramie fiber production plants, operating in this state, entitled to tax exemption, under section 12, article IX, of the state constitution, as industrial plants?

*To Honorable C. M. Gay, State Comptroller:*

Under section 12, article IX, of the state constitution, industrial plants "engaged primarily . . . in the manufacture of steel vessels, automobile tires, fabrics and textiles, wood pulp, paper, paper bags, fiber board, automobiles, automobile parts, aircraft, aircraft parts, glass and crockery manufacturers and the refining of sugar and oils, and including by-products or derivatives incident to the manufacture of the above products" are exempt from taxation for fifteen years or through the year 1948, whichever is the earlier.

The purpose of the foregoing constitutional provision was to induce new enterprises and industries to be established in the state, and to accomplish this purpose it should receive such construction as will carry out this purpose.

Ramie fiber production plants separate the ramie fibers from the ramie plant. The purpose of this separation is to make the ramie fiber available for



use, as the ginning of cotton or the separation of flax from the flax plant makes such fibers available for use. Like cotton, wool and flax, the ramie fibers may be spun into thread and other products. Ramie fibers seem to be raw materials as are cotton, wool and flax. There is no express inclusion of ramie fiber and its manufacture in the foregoing constitutional provision; however, should it be classified as a fabric or a textile? Fabrics and textiles are usually thought of as woven materials and not as the raw materials from which they are made. The question should be answered in the negative.

May 13, 1948.—048-154.

INDUSTRIAL PLANTS—TAX EXEMPTION—MANUFACTURE  
OF SHOES

QUESTION: Is a manufacturer of shoes exempt from taxes under section 12, article IX of the Constitution of the State of Florida?

*To Honorable W. Homer Smith, Tax Assessor, Volusia County, DeLand, Florida:*

I assume that the product manufactured is from leather.

Section 12, article IX, provides that certain industrial plants shall be exempt from taxation under certain conditions and for a specified time.

I am unable to find therein any authority for the exemption of an industrial plant manufacturing leather shoes.

I, therefore, answer the question in the negative.

FINANCIAL MATTERS, GENERALLY

October 24, 1947.—047-361.

FLORIDA SECURITIES COMMISSION—REFUNDS AUTHORIZED BY  
COMMISSION

QUESTION: May the Florida Securities Commission authorize payments of refunds, under section 215.26, Cumulative Supplement to Florida Statutes, 1941, upon proper application filed with the state comptroller and approved by the said securities commission?

*To Florida Securities Commission:*

Said section 215.26 provides that "The comptroller . . . may refund . . . any moneys paid into the state treasury which constitute: (a) an overpayment of any tax, license or account due; (b) a payment where no tax, license or account is due; (c) any payment made into the state treasury in error." Applications for such refunds "shall be filed with the comptroller within one year after the right to such refund shall have accrued . . . and such applications . . . shall be sworn to and supplemented with such additional proof as may be necessary to establish such claim." In this connection, see also sections 193.40 and 199.31, Florida Statutes, 1941, for similar statutes.

When the foregoing statutes are read together and their purpose and intent considered, it seems that the Legislature intended to vest the state comptroller with jurisdiction and power to receive, examine and pass upon applications for refunds and the proof offered in support thereof, and to either allow or reject the same, in whole or in part, without the intervention of any other officer, board or agency. However, where an application for a refund of moneys paid some other officer, board or agency is filed with the comptroller it would seem right and proper for the comptroller to present the same to such officer, board or agency, and request their ap-

proval or disapproval of the same before passing upon it, unless such approval be filed with the application. The approval or disapproval of the same by such officer, board or agency, would constitute additional proof before the comptroller when he makes his final decision in the case.

This observation seems to answer the above question.

December 17, 1948.—048-366.

#### BUILDING CONTRACT—BOARD OF CONTROL—LABOR DISPUTE

**QUESTION:** Under the circumstances outlined below, may the recital of certain excerpts from the Florida Statutes be omitted from the terms of a proposed contract between the Board of Control and Beers Construction Company?

*To Board of Control, Florida State University:*

Following my letter of December 2, 1948, pertaining to contract between the Board of Control and Beers Construction Company, my attention is now called to the fact that the hospital at the Florida Agricultural and Mechanical College in Tallahassee is being built with the aid of a federal grant; that the federal agency required that the specifications contain the federal regulation in regard to payment of the prevailing rate of wages in the community where the hospital is to be built; also that the secretary of labor, as a part of the federal regulation, had included a schedule of such prevailing rate of wages in this community.

Florida Statutes, 1941, section 215.19, provides that, in the event of dispute as to what the prevailing rates of wages may be, the matter shall be referred to the secretary of state of Florida for his determination, and his decision shall be conclusive.

The federal regulation and the act provide different methods of determining a dispute—as to what may be the prevailing local rate of wages in the event a dispute should arise. The state statute should be followed, and, therefore, I see no reason to change my opinion of December 2, which required the recital of the provisions of the statute, as has been customary in all of these contracts.

#### MOTOR VEHICLES SUBJECT TO SINGLE PROPERTY TAX

October 14, 1947.—047-339.

#### AIRCRAFT AS MOTOR VEHICLES—EXEMPTION OF AIRCRAFT

**QUESTIONS:** 1. Is the classification of aircraft as motor vehicles, under section 13, article IX, of the Florida Constitution, by section 1, chapter 24045, Laws of Florida, acts of 1947, a valid classification?

2. Is section 6, chapter 24045, Laws of Florida, acts of 1947, insofar as it exempts aircraft from state and municipal tangible personal property taxes, a valid enactment?

3. Are aircraft exempt from county and district tangible personal property taxes under section 6, chapter 24045, Laws of Florida, acts of 1947?

*To Honorable C. M. Gay, State Comptroller:*

Section 13, article IX, of the Florida Constitution, provides that "motor vehicles" shall be "subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles;" however, said section does not define the term "motor vehicles" used therein. Section 1, chapter 24045, Laws of Florida, acts of 1947, provides that "aircraft means any motor vehicle (as used in section 13, article IX, of the constitution of the State of Florida), now known, or hereafter invented, used or designed

for navigation of, or flight in the air." Section 6 of said chapter 24045 provides licenses and license fees for aircraft operating in this state, and further provides that "such fees shall be in lieu of all state and municipal personal property taxes on aircraft."

A former attorney general of this state, by opinion dated May 30, 1932 (1931-1932 Biennial Report, page 689), held that airplanes were not motor vehicles within the purview of said section 13, article IX, of the state constitution. Although airplanes have been held to be motor vehicles for certain purposes (*South Mississippi Airways v. Chicago and Southern Airlines*, ..... Miss. ...., 26 So. 2d. 455; *U. S. v. One Pittcairn Biplane*, 11 Fed. Supp. 24), the majority of the few cases on the question appears to hold that airplanes are not to be considered as motor vehicles under the statutes generally (Annotation 165 A. L. R. 916).

As a general rule, a legislative construction of an ambiguous constitutional provision should be given serious consideration by the courts when construing such provision (16 C. J. S. 72, Section 33; *Amos v. Mosley*, 74 Fla. 155, 77 So. 619, text 625).

Several of the courts hold that the substitution of one kind of the tax in lieu of any other tax is not an exemption within the limitations usually imposed by constitutional provisions regulating the power of the Legislature to exempt property from taxation (2 *Cooley Taxation* 4th Ed. 1396, section 668; 61 C. J. 383 and 384, Section 382; 51 *Am. Jur.* 525 and 526, section 523; and cases cited by said authorities).

The license tax is, by said section 6 of chapter 24045, in lieu of all state (there is no state tangible personal property tax, see section 2, article IX, of the constitution), and municipal personal property tax on aircraft. County taxes are not mentioned in connection with this exemption. This may not make the license fee a tax in lieu of county and district personal property taxes on aircraft. However, if aircraft are motor vehicles within the purview of section 13, article IX, of the said constitution, then they are exempt from county and district personal property taxes by virtue of said constitutional provision.

From the foregoing authorities there appears to be a serious question as to the validity of chapter 24045, insofar as it attempts to classify aircraft as motor vehicles under section 13, article IX, of the constitution; as to the validity of said chapter 24045 (if aircraft may not be classified as motor vehicles), insofar as it attempts to exempt aircraft from ad valorem taxes; and as to whether the exemption, in section 6 of said chapter, of aircraft from state and municipal taxes also exempts them from county and district taxes.

It has not been the policy of the attorney general to pass upon the constitutionality of laws where there is any doubt as to their validity under the state or federal constitutions.

The foregoing questions are important and should be passed upon by the courts. It is suggested that arrangements be made for the bringing of court proceedings to procure construction of the law in question. It would seem proper for the state and county taxing officials to comply with the law in question until the foregoing questions are settled by the courts.

## CHAPTER XIII

### HOMESTEADS AND EXEMPTIONS

#### METHOD OF SETTING APART HOMESTEAD AND EXEMPTIONS

January 9, 1948.—048-17.

##### TEMPORARY ABANDONMENT—EVIDENCE OF HOMESTEAD RIGHTS

**QUESTION:** Where the owner of a homestead, upon which he has been residing and entitled to tax exemption, moves to an apartment in a municipality at a distance from such homestead, may he continue to be entitled to tax exemption as to such property?

*To Honorable Wiley J. McDavid, Tax Assessor, Escambia County, Pensacola, Florida:*

Once a homestead has been acquired, its character as such can be waived only by alienation in the manner provided by law or by abandonment. Since the property in question has not been alienated the problem is reduced to a determination of whether there has been an abandonment of the homestead (opinion 047-103).

The homestead right may be successfully asserted against creditors where it appears that the removal from the premises was only temporary, that is, with the intention of returning thereto and resuming occupation thereof as a home. Where absence is only temporary, the family may be deemed to have continued to occupy the premises. Accordingly, the claim of homestead is held to be sustained where the evidence shows that the purpose of the departure from home was business, health, pleasure, education of children, etc. The temporary removal of a man from his homestead to another state for the benefit of his wife's health, with the intent to return and make the premises his home, has been held not to constitute an abandonment of the homestead, although the claimant may have exercised the elective franchise in the other state while residing there. Nor will an abandonment of the homestead be inferred from the fact that the head of the family has gone in search of another home and, being disappointed, has returned to the premises. (26 Am. Jur. 120, section 194; 40 C. J. S. 641 et seq., section 164 et seq.; Hillsborough Investment Co. v. Wilcox, 152 Fla. 839, 15 So. (2d) 448.)

Whether or not there has been an abandonment of a homestead so as to deprive it of its status as such under the constitution must be determined by a consideration of all the pertinent facts and circumstances in each case. The ultimate determination of these facts must of necessity lie with the tax assessor. If the tax assessor finds that the claim for homestead is supported by facts coming within the foregoing rules of law, then he should grant the homestead notwithstanding the fact that the owner is not residing thereon.

November 15, 1948.—048-343.

##### MARRIED WOMAN RESIDES IN ANOTHER STATE— HOMESTEAD EXEMPTION FLORIDA PROPERTY

**QUESTION:** Where a woman who is entitled to homestead exemption from taxes in this state marries a man residing in another state and moves with him to that state, may she legally claim said former homestead in this state as her present homestead so as to exempt the same from taxation?



*To Honorable Claude H. Smith, Tax Assessor, Green Cove Springs,  
Florida:*

If I correctly construe the request for opinion, the woman in question married a resident of another state and moved to that state and is residing with her husband in such state in a rented apartment. She is renting her former home in this state to her brother.

There is no showing that her said brother is in any way dependent upon her for support. The domicile of the wife, so long as she resides with her husband, follows his domicile (see *Tigertail Quarries v. Ward*, 154 So. 122, 16 So. 2d. 812; *Hunt v. Hunt*, 61 Fla. 630, 54 So. 390; *Thompson v. Thompson*, 86 Fla. 515, 98 So. 589). The domicile of the husband in this case being in another state, seems to indicate that the domicile of the wife is the same. Furthermore, there is nothing in the request to indicate that the residence in the other state is in any way temporary for any recognized purpose, entitling the claimant to a homestead in this state.

From the facts presented by the request, I find nothing from which exemption from taxes for the property in question may be based.

The question must be answered in the negative. This opinion is based upon the facts appearing from said request and should not be taken as concluding the question, if presented upon a different set of facts.

## CHAPTER XIV

### EDUCATION

#### STATE PLAN FOR PUBLIC EDUCATION

December 10, 1947.—047-433.

##### TUITION—OUT-OF-STATE STUDENTS—STUDENT INSURANCE

QUESTIONS: 1. Is it legal for a County Board of Public Instruction to charge tuition fees to out-of-state students?

2. Is it the responsibility of the school board to carry Workmen's compensation insurance for teachers?

3. Is it permissible for a school board to carry insurance against injuries which students may receive while in a class room or school building?

*To Honorable Colin English, State Superintendent of Public Instruction:*

"Out-of-state students" as used in the request for opinion evidently means students who are not bona fide residents of this state, or if they are minors, their parents are not bona fide residents of this state.

Section 228.16(2) provides that

"No matriculation or tuition fees shall be charged pupils whose parents are bona fide residents of this state . . ."

The prohibition does not extend to nonresidents, and it is, therefore, my opinion that tuition may be charged to any pupil who is not a bona fide resident of the state, or if a minor, whose parents are not bona fide residents of the state. The question arises as to who is a bona fide resident. As I pointed out in another opinion a few days ago, the question of whether a person is a bona fide resident of the state is one of both law and fact, and should be determined from all the facts in each particular case; and is largely a matter of intention, accompanied by actual presence in the state. If the parents took up their residence in the state with intention of remaining permanently, or with no present intention of removing therefrom, such residence is sufficient to qualify them as bona fide residents within the meaning of the statute involved in the question. No minimum period of residence is required; but good faith must always be present. The Florida Supreme Court has, in general, been liberal in construing who may be a bona fide resident.

As to the second question, I direct attention to section 440.38(5) which reads as follows:

"The state, its boards, bureaus, departments and agencies and all its political subdivisions who employ labor shall be deemed self-insurers under the terms of this chapter unless they elect to procure and maintain insurance to secure the benefits of this chapter to their employees and they are hereby authorized to pay the premium for the said insurance."

I have heretofore held, and now reaffirm, that the foregoing statute applies to County Boards of Public Instruction, and that under this section a county board may decline to carry such insurance, in which event it is a self-insurer. Use of school funds to procure such insurance is permitted. In other words, the county boards may carry such insurance or not, as it sees fit.

The only authorized expenditure of school money for insurance against injuries to students is insurance covering liability for damages on account of injuries to pupils by reason of the ownership, maintenance, operation,

or use of school buses while pupils are being transported to or from school or school activities. There is no authority for use of school money to pay premiums on insurance against injury to pupils while they are in the class room or school building.

January 12, 1948.—048-12.

#### SUMMER SCHOOL—TUITION FOR RESIDENTS—STATE BOARD AUTHORITY

QUESTIONS: 1. May nonresident students be charged tuition in the public schools of the state?

2. What fees or tuition may be charged during the regular sessions of the public school to pupils whose parents are not bona fide residents of the State of Florida?

3. May the State Board of Education lawfully authorize county school boards to operate summer schools and charge tuition to resident students?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The first question is answered in an opinion of December 10, 1947, No. 047-433.

There is no statutory regulation of the amount of fees or tuition which may be charged to nonresident pupils. An appropriate charge might be the actual cost of supplying the instruction or the pupil per capita cost. The amount may be fixed by the county board but must be consistent with any regulations which may be made by the State Board of Education.

The school code is silent as to summer schools at lower-than-college levels. Chapter 23726, Laws of Florida, 1947, amended section 228.16 of the statutes. As amended, that section now covers all statutory provisions for fees and tuition in any of the schools conducted as a part of the county school system, and no matriculation or tuition fees may be charged except as set out therein. The section permits tuition charges for nursery schools, if the county board so determines. It also permits matriculation fees and tuition in certain other courses but only if and as authorized by regulation of the State Board of Education. Such courses are, (a) thirteenth and fourteenth grades when offered, and (b) "other schools, courses and classes." "Other schools, courses and classes" are defined in section 228.14(3) of the statutes. Among others, they include "part-time, evening, and vocational schools and classes; . . . and . . . other types of instruction of a similar educational nature." It is my opinion that summer schools of all grades and classes are within the meaning of "other schools, courses and classes." Furthermore, section 228.19 vests in the State Board general control of "other public educational services" with certain exceptions not pertinent to this question.

Since the State Board of Education may authorize charges for tuition for "other schools, courses and classes," even during the regular school year, and since that phrase includes summer schools, it follows that they may authorize charges for tuition to resident pupils attending summer schools.

#### COUNTY SCHOOL SYSTEM

July 1, 1947.—047-188.

#### SCHOOL BOARDS—APPOINTMENT OF MEMBERS

QUESTION: When, if at all, is the governor, in pursuance of chapter 23726, Laws of Florida, acts of 1947, required to fill by appointment vacancies in office with respect to new county board member residence

districts four and five in those counties which had three-member county school boards at the effective date of said act?

*To Honorable Millard F. Caldwell, Governor:*

Section 230.04, Florida Statutes, 1941, as amended by section 5 of said chapter 23726, provides:

"The county board in each county shall be composed of five members. Each member of the school board shall be a qualified elector of the county in which he serves, and shall be a resident of the county board member residence district from which he is elected as hereinafter provided."

It is noted that in connection with the transition from three to five member boards in the fifty-nine counties of the state thus affected, no specific date therefor is given. It is pointed out that certain of the other provisions of said chapter 23726 are made effective on stated future dates (e.g., sections 10, 12 and 21 of the act); indeed, a reading of the act indicates the legislative intent that when it was deemed advisable to postpone the operating effect of any provision, a specific date therefor in the future was provided. Hence, it would appear that the act being silent as to when said transition takes place, the effective date of the act, viz., July 1, 1947, would apply, unless other provisions of the act are to be construed as limiting or conditioning such application.

Obviously, until definitely under the law the five county board member residence districts have been established, no occasion arises for the filling of any vacancies. (On this point, see opinion No. 046-117, Biennial Report of Attorney General, 1945-1946, page 383, concerning filling of vacancies whereby operation of section 230.04, prior to amendment, a county moved into the 80,000 population class.) Section 230.06, as amended by section 6 of said chapter 23726, states that the five county board member residence districts shall conform as to boundaries and numbers with the five county commissioners districts, provided, however, that by resolution of a county board duly adopted within six months from the effective date of said chapter 23726, such districts and their numbering may be fixed by the county school board as in said section provided.

Sections 230.08 and 230.09, Florida Statutes, 1941, as amended, respectively, by sections 7 and 8 of said chapter 23726, provide for nomination in the primaries of members of said board, and that in the 1948 election, as to counties affected as aforesaid, members from residence districts two and four shall be elected for four-year terms and the members from residence district five for a two-year term, and at subsequent general elections members shall be elected on the basis of such plan, so that three members are elected at one general election and two at the next ensuing general election.

In view of the foregoing, in my opinion the question is properly answered as follows:

With the law as vague as it is concerning the transition from three-member to five-member boards in the counties affected, several respectable and diverse positions could be assumed and urged in answer to the question. However, in my judgment, the most reasonable construction of the aforementioned sections of chapter 23726 is that it was the legislative intent to give a six months' period after July 1, 1947, within which such districts could be established either by inaction of the boards and operation of law or by positive action of the boards. This position logically derives from (1) the apparent right of any of such boards to prescribe its districts at any time prior to the lapse of such period, and (2) uniformity of the operation of the law argues for a definite date when such transition should become effective as to all affected counties. Thus, at the end of said six months, vacancies will exist as to members from districts four and five,



properly to be filled by appointment by the governor for the period terminating the first Tuesday after the first Monday in January, 1949.

However, the composition of the school boards in fifty-nine counties are under consideration and implicit in the subject is the right of such boards to issue bonds, to borrow large sums of money for purchase of school buses, school sites, for erection and alteration of school plants, etc., and otherwise validly function in the performance of the important duties under the law vested in them. An opinion of this office lacks, of course, the finality of a court decision. Hence, to settle all uncertainties which will surely arise in connection with the authority or lack of authority of the boards in the counties affected, it is recommended that the governor, in pursuance of article IV, section 13, Florida Constitution, obtain an opinion from the Supreme Court of Florida concerning his duties in the premises.

November 8, 1947.—047-376.

#### SCHOOL BOARD APPOINTEES—BOARD MEMBERS—TAKING OFFICE—COMPENSATION

QUESTIONS: 1. When should the new school board members appointed by the governor actually assume their official duties?

2. What compensation is payable to such new school members?

*To Mr. Damon Hutzler, Superintendent, Titusville, Florida:*

Chapter 23726, Laws of Florida, 1947, amending section 230.04 of the statutes, increased the number of school board members from three to five in those counties which had only three. It became effective on July 1, 1947. In an advisory opinion to the governor dated September 5, 1947, and reported in 31 So. 2d. 854 (advance sheets), the supreme court held that upon the act becoming effective there were two vacancies on the school board of each of those former three member board counties which should be immediately filled by appointment. From what is said in the supreme court opinion the conclusion is inevitable that immediately upon appointment the new school board members should qualify and take office by taking the prescribed oath and giving the bond required by sections 230.12 and 230.13, Florida Statutes, 1941.

Section 242.02, Florida Statutes, 1941, providing for compensation of county board members, was amended by chapter 23726, Laws of Florida, 1947, and now reads as follows:

"Each member of a county board shall be allowed from the county school fund of his county for his expense ten dollars per day and seven and one-half cents per mile for every mile actually traveled in going to and from the county court house by the nearest practicable route, for participation in each regular and special meeting of the board; Provided, such allowance shall not be made for more than eighteen meetings in any one fiscal year in counties having a population of less than 80,000 according to the last preceding state or federal census, nor for more than twenty-four meetings in any other county; and Provided, further, that this section shall not apply until January 1, 1951, to counties in which compensation is prescribed by special or local law, or by general law with stated population application."

Under that section the members of the county board, old members and new members, are now to be paid the amount therein allowed, except in those counties in which the compensation of county board members is provided by special or local law or population act, in which event the new members, as well as the old, are to be paid according to such special or local law or population act until January 1, 1951.

October 23, 1947.—047-360.

#### NEW BOARD MEMBERS—PAY OF SCHOOL BOARD—PASCO COUNTY

**QUESTION:** What compensation should be paid to the two additional members of the new five-member school board appointed, or to be appointed, for Pasco county, pursuant to sections 5 and 6, chapter 23726, Laws of Florida, acts of 1947, which amended sections 230.04 and 230.06, Florida Statutes, 1941?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Said chapter 23726 was passed by the House of Representatives on April 24, 1947, and by the Senate on May 2, 1947, and was sent to the governor and approved by him on May 20, 1947, becoming effective on July 1, 1947. Chapter 23876, Laws of Florida, acts of 1947 (which is a local act fixing the compensation "of each member of the board of public instruction of Pasco county, Florida"), was introduced, enacted and sent to the governor subsequent to the enactment of chapter 23726, and it may be presumed that the Legislature knew that all three-member school boards were increased to five-member boards by said chapter 23726. Furthermore, said chapter fixes the compensation of "each member of the board of public instruction of Pasco county, Florida" without any express limitations as to the membership of the board.

When said chapters 23726 and 23876 are read together, it seems clear that the two additional members of the county school board in question should be paid the same compensation as is provided for the regular or prior members.

October 15, 1947.—047-357.

#### SCHOOL BOARD DISTRICTS—ADVERTISING CHANGE OF DISTRICT BOUNDARIES

**QUESTION:** Is it necessary that the resolution determining the boundaries of the five school member residence districts, in accordance with chapter 23726, acts of 1947, be published in the newspaper?

*To Carroll M. Russell, Attorney, Board of Public Instruction, Bushnell, Florida:*

In amending section 230.06 of the statutes, by chapter 23726, Laws of Florida, 1947, the Legislature omitted all reference to filing a description of the boundaries of the county board election districts, (now called "county board member residence districts"), in the office of the clerk of the circuit court, and also omitted all provision for publication of the description of the boundaries, both of which were required by that section prior to the amendment.

Section 230.07, which was not amended by the foregoing 1947 act, provides for publication when the boundaries of an election district are changed pursuant thereto. Changes in such boundaries under said section 230.07 must be made at a "meeting of the county board held in January of the year of any general election." Under section 230.06 as amended in 1947 the county board is permitted to establish new board member residence districts only "within six months from the time this law becomes effective" or prior to January 1, 1948, or during 1947, which is not a general election year as mentioned in said section 230.07, which section was not amended in 1947. It is my opinion that section 230.07 does not apply to the establishment of the boundaries of county board member residence districts when now set up in pursuance of section 230.06. The last mentioned section appears to be complete as to procedure. The only thing now required, if the county board does not wish to adopt the county commissioners' election districts, is the adoption of a resolution fixing the boundaries of the county board member residence districts.

Even though not now required in setting up the new districts for the first time under section 230.06, it is my opinion that the board could lawfully publish description of the boundaries if, in the board's opinion, it would be advisable to do so.

Unless section 230.07 should be repealed, it will apply and publication will be necessary if the board should, at some later time, find it necessary to change the boundaries which they are now establishing under section 230.06.

June 6, 1947.—047-163.

#### SCHOOL BOARD DISTRICTS—BOUNDARIES

**QUESTIONS:** (Recently Broward county was redistricted into county commissioner districts. District No. 1 now lies north of New river and has as its south boundary line "the low water mark on the North Bank of New river." District No. 4 lies south of New river and has as its north boundary line "the low water mark on the south bank of New river." A part of district No. 3 lies south of New river and west of district No. 4, and a part of district No. 3 lies north of New river and east of district No. 1, these two parts of district No. 3 being joined by the channel of New River. It is further noted that the south boundary of precinct No. 14 and the north boundary of precinct No. 19 "is the center line of New river.")

1. Would it be legal to have county commissioner district No. 3 divided into distinct parts not connected by the river or otherwise?

2. If not, is the present arrangement with the river connecting the two parts of district No. 3 a legal one?

3. If the present arrangement is legal, where should the occupants of house boats docked on each bank of New River register and vote?

4. In the event the school board does not take action to change its district boundaries so that precincts will not be split, by what method will electors of the same precinct vote for members of different school board districts?

(Precinct boundaries in said county are being changed to conform to the requirements of the new county commissioner districts. In doing this, school board member districts no longer conform to the precincts.)

*To Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Fort Lauderdale, Florida:*

The foregoing questions are answered in their numbered order as follows:

(1) and (2). These questions appear to involve statutory and constitutional powers and duties of county commissioners rather than the supervisor of registration; hence, it would not appear appropriate to answer them under the instant circumstances.

(3) From the information furnished, it seems that the south boundary line of precinct No. 14 and the north boundary line of precinct No. 19 is the center of New river, and it is assumed that such precinct boundaries existed prior to the redistricting of the county into county commissioner districts recently. The request for opinion states that since the new plan for county commissioner districts has been put through, voting precincts are being changed to conform to the new districts. Just what the situation will be then, with respect to this part of New river, is not evident. It is assumed the occupants of the house boats mentioned maintain their residence in such boats and that they are qualified electors of Broward county. On the information at hand, it seems the only answer which can be given the question is that such electors residing in house boats docked on each bank of New river should properly be registered in the precincts where their respective boats are located.

(4) According to the 1945 census, Broward county has a population of 50,442, and in pursuance of section 230.04, Florida Statutes, 1941, it is assumed that it has had a three-member school board. This section was amended by section 5 of said chapter 23726, which provides now that the board in each county shall be composed of five members.

Section 6 of said chapter 23726 amended section 230.06, and provides that the county shall be divided into five county board member residence districts, "the boundaries and numbers of which shall conform to the boundaries and numbers of election districts for county commissioners, provided, however, upon resolution duly adopted by a county board within six months from the time this law becomes effective a county can be divided into five numbered county board member residence districts so as to place in each district, as nearly as practicable, the same number of qualified electors, the lines of said districts to be so drawn as to place each election precinct wholly within one or another of the county board election districts."

It would seem that observance of these provisions of said chapter 23726 will care for the situation reflected in the question and the statement in connection therewith.

Thus, since the law contemplates that each such election precinct shall be placed wholly within one or another of the county board election districts, when the board has complied with the requirements of the law, the apparent difficulty reflected in the question and statement will be removed.

January 12, 1948.—048-14.

#### COUNTY SCHOOL BOARD—RESIDENCE DISTRICT—CHANGE OF BOUNDARIES

**QUESTION:** Where a county board within six months of the effective date of chapter 23726, Laws of Florida, 1947, adopts a resolution dividing the county into five county board member residence districts, may they now, after the expiration of said six months, adopt another resolution changing the boundaries of the county board member residence districts to comply with the boundaries of the five county commissioners districts?

*To Byron Butler, Attorney, Taylor County Board of Public Instruction, Perry, Florida:*

Section 230.06, as amended by chapter 23726, Laws of Florida, 1947, requiring five county board member residence districts in each county, provided that the districts should be the same as the county commissioners' district unless the county board should set up its own five districts within six months of the effective date of the act, that is, prior to January 1, 1948. It appears that after setting up its own county board member residence districts in pursuance of section 230.06, as amended, the board now realizes that it would be better to make the boundaries uniform with those of the county commissioners districts.

Section 230.07 reads as follows:

"The county board of any county may make changes in the boundaries of any county board election district of the county which they deem necessary to meet the requirements prescribed in this chapter at any meeting of the county board held in January of the year of any general election. Such changes in boundaries shall be shown by resolutions spread upon the minutes of the county board, shall be recorded in the office of the clerk of the circuit court, and shall be published as required for fixing such county board election districts in the first instance."

It is my opinion that notwithstanding the fact that within the six months' period allowed for such action, the board adopted a resolution



establishing five county board member residence districts differing from the county commissioners districts, they have authority under section 230.07 to again change the boundaries of the districts in the month of January, 1948, and if they see fit, they may make them uniform with the county commissioners' districts. In doing so, it will be necessary to comply with the procedural steps prescribed by section 230.07 quoted herein, except that the amendment of section 230.06 having omitted its former provision for publication of the description of such boundaries, repealed that requirement and there is now no necessity for the publication. However, the board may lawfully publish such descriptions if it deems it advisable to do so.

The "county board member residence district" as used in chapter 23726, acts of 1947, is the same as "county school board election district" or "county election district" as used elsewhere in the school code.

September 16, 1947.—047-305.

#### SCHOOL BOARD MEMBER—REDISTRICTING—APPOINTMENT OF NEW MEMBERS

QUESTIONS: 1. When are the two additional members of the County Board of Public Instruction required by section 230.04, as amended by chapter 23726, Laws of Florida, 1947, to be appointed?

2. For which county board member residence district will they be appointed?

3. If a present member of the county board resides in county commissioners' districts 4 or 5, or in district 4 or 5 of the county board member residence districts as established by the county board under the authority of section 230.06, as amended, does he continue as a member of the board, notwithstanding the appointment now of a new member from the same district?

*To Messrs. McLeod and McLeod, Attorneys for County Board of Public Instruction, Apalachicola, Florida:*

The first two questions have been answered by the Florida Supreme Court by an advisory opinion of September 5, 1947, in which the court held it was the duty of the governor to appoint two new members to the county board now, and also that vacancies necessarily exist in "county board member residence districts" numbers 4 and 5, respectively.

Adverting to the third question, reference is made to section 230.04, as amended by chapter 23726, which reads as follows:

"The county board in each county shall be composed of five members. Each member of the county board shall be a qualified elector of the county in which he serves, and shall be a resident of the county board member residence district from which he is elected as hereinafter prescribed."

Section 230.19 provides that the office of any county board member shall be vacant when he removes his residence from the county board election district from which he was elected. I think this last mentioned section may be disregarded because it cannot be said that a county board member has removed his residence from the county board election district from which he was elected merely by the inclusion of the area in which he resides in a different numbered county board member residence district. The rule is that redistricting of a county so as to leave an officer in another district from that from which he was elected does not vacate his office. There is nothing in the 1947 school law amendments which indicates legislative intent to remove any school official from his office. Furthermore, sections 230.04 and 230.09, as amended, clearly imply that no county board member is to be disturbed in the occupancy of his office regardless of the district in which he resides.

After the 1945 census which brought three more counties of the state into the 80,000 population bracket, there was a situation very similar to this, because section 230.04, prior to the 1947 amendments, required transition from a three to a five member board and the division of the county into five county board election districts in all counties moving into the 80,000 population brackets. Several opinions were written regarding that situation. I held that the county board member did not lose office by reason of his residence area being incorporated in a different numbered election district, and that until the matter could be worked out in due course of subsequent elections, there lawfully could, and might be, two county board members from the same election district.

For these and other reasons, it is my opinion that section 230.04, in requiring that a county board member "shall be a resident of the county board member residence district from which he is elected as hereinafter prescribed," is prospective only and has no application to county board members holding office on the effective date of chapter 23726.

The third question is answered in the affirmative.

January 8, 1948.—048-3.

#### SCHOOL BOARD MEMBERS—SALARY OF BOARD MEMBER

QUESTION: When do the salaries of the newly appointed members of the County Board of Public Instruction begin?

*To Honorable Millard F. Caldwell, Governor:*

In answering the question I assume that it refers to the county board members whom you recently appointed to fill vacancies upon the transition in most counties from a three-member to a five-member board?

The salary of such newly appointed county board member begins as soon as he qualifies and enters upon the performance of his duties. He qualifies by taking the oath prescribed by section 230.12 and filing the bond required by section 230.13, Statutes of 1941.

September 25, 1947.—047-326.

#### SALE OF SCHOOL BUS—ADVERTISEMENTS OF SALE—APPROVAL OF SALE

QUESTIONS: 1. What are the correct legal steps for a county board of public instruction to take in the disposition or sale of school property such as bus equipment? What, if any, are the requirements for giving the public notice of such sales?

2. What is the duty of the school board and the county superintendent in the acceptance and rejection of bids for private operation of school buses under contract? Could a school board without giving reasons therefor reject several low bids and award a contract to a bidder where the bid was several cents per mile higher than the low bids?

3. Does a school board have the authority to award bids for bus transportation to contractors for more than one year? Where contracts are let for as much as three years can the outgoing county board and superintendent obligate their successors in office for several years to come?

4. In order to be legal, is it necessary for a county superintendent to sign a transfer of title of bus equipment which has been sold by the county school board?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The authority of the county board to sell school property which may not be needed, is in section 230.23 (4) of the statutes, where the board is empowered to sell and dispose of such property to the best interest of the

school system. Other than the requirement that the sale of such property be made in pursuance of resolution adopted and spread upon the minutes of the board, the statutes do not prescribe the manner in which the county board shall sell such property. Ordinarily, the long established custom of advertising the sale of public property should be followed and diligent efforts should be made to notify those persons and agencies which might be in the market for such property, but in the absence of a statute requiring it, failure to give notice by advertisement would not invalidate the sale if free of fraud and otherwise lawful.

There is a restriction on the sale of school buses if the buses were purchased entirely or in part with funds provided by the state through the State Teachers' Salary Fund. A regulation of the State Board of Education of April 1, 1941, prohibits the sale of such buses within five years of their purchase without the prior approval of the state superintendent of public instruction of both the sale and terms of the sale.

The duties of the county superintendent with reference to acceptance or rejection of bids for property or service are advisory. The county superintendent gathers all necessary data and information and submits same with his recommendation as to what action the board should take. His duty ends there. (See section 230.33 (12) (i).) The county superintendent does not participate in the vote on any matters submitted. The board alone determines by majority vote what action shall be taken. This applies to the acceptance or rejection of bids for private operation of school buses under contract as well as to any other question.

Section 237.02 (2) provides that in making purchases the county board shall accept the lowest and best bid. The low bid may not be the best bid, and the authorities are in substantial agreement that under such statutes a public board or agency receiving bids may use its judgment and discretion as to which is the best bid regardless of whether or not it is lowest. A county board may reject the lowest and accept a higher bid if in its opinion the latter is the best bid. The law does not require the school board to give reasons for its action on any question and that would include its rejection or acceptance of bids for supplying property or services.

The county superintendent does not make contracts except for those purchases which he may be authorized to make by county board regulation. Even when making such purchases he acts for the board.

When authorized by statute, contracts may extend beyond the terms of a county school board and thus be binding upon a successor board. If the contract is valid when made, it will be binding throughout its term. Such, for example, are the contracts authorized in section 237.27, which, when approved by the state board, may run for four and six years. But the county board may contract beyond the school fiscal year only when authorized by statute. There is no authority for a contract for bus transportation beyond the current school year and a transportation contract for any period beyond the current school year is void. (See also section 237.25.)

It is not necessary for the county superintendent to sign the assignment of the title certificate upon the sale of a bus by the county school board.

September 12, 1947.—047-295.

#### ATTENDANCE AREA—DETERMINATION—FINAL ATTENDANCE AUTHORITY

QUESTIONS: 1. Who has the final authority to determine which schools children shall attend, that is, who determines attendance area for each school.

2. May school principals, or bus drivers, disregard the determination by the county board of school areas, or the county board's determination of which school shall be attended by particular children?

*To Mr. H. P. Preston, Chairman Board of Trustees, Melrose School District, Melrose, Florida:*

Section 230.23(6) (a) of the statutes authorizes the county board to approve the area from which children are to attend each school, such area to be known as the attendance area for that school.

In the same section, in subparagraph (b) it is made the duty of the county board to make arrangements for children to attend those schools offering the facilities needed by the children which are most readily accessible and which would involve the least cost, regardless of whether the schools are located in another district than that in which the children reside, or are located in another county.

Construing that statute, the supreme court, in *Burdeshaw v. Vassar*, 24 So. 2d. 364, held that the final authority for establishing the attendance area was in the Board of Public Instruction, and that the board had authority to designate the school which the children should attend, and to provide for transportation of the children to the schools designated by it.

No school principal or bus driver has the right to disregard a determination of the school board as to which school shall be attended by the school children. A bus driver may not lawfully transport children to schools other than those schools determined by the board, and a school principal may not admit children to his school who have been ordered by the board to attend a different school, regardless of whether or not the school trustees of the principal's school may be willing to accept such children.

It is, of course, the duty of the county board to consider the viewpoint of the trustees and the county superintendent in all such matters as this, but the final authority is in the county board.

November 17, 1947.—047-387.

#### SCHOOL FUNDS—PURCHASE OF BAND UNIFORMS—TRAINING OF BAND

QUESTION: May school tax money be lawfully used for the purchase of uniforms for a school band?

*To Mrs. Margaret K. Farnam, Superintendent of Public Instruction, Glades County, Moore Haven, Florida:*

The teaching of music and the organization of a school band are a part of the cultural training and education which may be provided for school children from school tax funds if such funds of the county are sufficient. In addition to its cultural training, a properly equipped school band is a valuable aid in the development and maintenance of school spirit and morale which are elements of importance under the modern conception of education. The county board has authority to adopt such training as a part of the school program, and just as it may do in regard to any part of the program, the board may provide equipment, facilities and aids necessary to carry out the program. See section 230.23(9). It is my opinion that when available and properly allocated and budgeted, county school funds may lawfully be used for the purchase of uniforms for the school band.

October 7, 1947.—047-318.

#### CREATION OF DISTRICT—CONFLICT OF LAWS—TRUSTEE TENURE OF OFFICE

QUESTION: Chapter 17499, special acts of 1935, attempted to create special tax school district No. 5 from a part of what was then district No. 2 in Brevard county, effective upon ratification by a majority vote of described electors in the territory affected, but no election was held until



August, 1947, at which time an election held under authority of that special act resulted in a majority vote in favor of the creation of the district. Two of the trustees of district 2 reside in new district 5. May they serve as trustees of district 2 until the end of their term which expires January 1, next?

*To Mr. Damon Hutzler, Superintendent of Schools, Brevard County, Titusville, Florida:*

The school code contains evidence of a legislative intent not to disturb school officers in the possession of their offices prior to the expiration of their terms by district or other area boundary changes. I think, however, it is not necessary to answer the question because the special act under which the election was held—chapter 17499—appears to have been repealed by section 106 of chapter 19355, Laws of Florida, 1939, the School Code. That section repealed all conflicting laws, and part of laws, general, special and local, with certain exceptions of which chapter 17499 is not one. There is clearly a conflict between chapter 17499 and the school code as to the method of establishing a school district. It would appear that unless the new district No. 5 were created under the terms of some other and valid act it would not be a lawfully created district, and the boundaries of district 2 would be the same as they were before.

October 3, 1947.—047-320.

#### TRUSTEE ELECTION—REGISTRATION OF VOTERS—SUWANNEE COUNTY

QUESTION: May the supervisor of registration of Suwanee county, Florida, open the registration books now to permit electors otherwise qualified to be registered therein in order that they may vote in the election to be held in said county on November 4, 1947, for the election of school trustees and adoption of millage?

*To Honorable J. Q. Boatright, Supervisor of Registration, Suwannee County, Live Oak, Florida:*

It is assumed that registration of electors in Suwannee county is controlled by the general laws related to such matter, as distinguished from any population or local acts; and this opinion is conditioned upon such assumption.

The election contemplated by this question is required "to be held and conducted in the manner prescribed by law for holding general elections," except as provided in chapter 236, Florida Statutes, 1941. See section 236.32(2) (a); and also section 230.34(6), as amended by chapter 23726, Laws of Florida, acts of 1947, and section 236.32(3). Since there appears to be no provision in said chapter 236 specifically related to registration of electors for such an election the question presented must find its answer in construction of the above-quoted words.

The general election registration books are required to be kept open (either in the supervisor's office or in the precincts), in each year in which a general election is held for the period from the first Monday in August until the thirtieth day preceding such general election; and it is provided that, "The registration books of each county shall be closed on said thirtieth day preceding the day in each year in which there shall be a general election, and no person shall be allowed to register at any time other than during the period herein provided for the opening of said books for registration of electors." (Section 98.22, as amended by chapter 24203, Laws of Florida, acts of 1947.)

If the "holding" or "conducting" of an election, as such words are used in section 236.32(2) (a), were construed to include registrations for such election, then each year preceding a school trustee election the registration

books would be required to be kept open at the same times and places during that year as provided for their opening during the year in which there is a general election. It is not felt that such was contemplated by said quoted terms, in view of the quoted provision of section 98.22, as amended, set forth in the immediately preceding paragraph, and the failure of the Legislature to provide a special registration for such a school district election.

Electors who were qualified according to the registration books to vote at the last preceding general election and who, at the time of the election contemplated by the question, are still registered electors who are otherwise qualified to participate in such a school election as required by law, are duly qualified electors for such a school district election. Persons who have otherwise become qualified electors for such an election since the registration books closed preceding the 1946 general election, cannot reasonably complain that, being denied opportunity to register they are denied the constitutional right to participate in such election. The registration of electors is controlled by statute and in pursuance of constitutional mandate to the Legislature (article VI, section 2, Florida Constitution), and the Legislature has not seen fit to provide for a special registration. An analogous situation confronted the Legislature with respect to the holding of special elections, yet no provision was made for special registrations therefor. (See Section 98.09, Florida Statutes, 1941.)

In view of the foregoing, in my opinion the question is properly answered as follows:

No authority appears to exist for the opening of the registration books at this time in Suwannee county to permit electors otherwise qualified to be registered therein in order that they may be qualified to vote in said school district election to be held in said county on November 4, 1947.

October 19, 1947.—047-345.

#### SCHOOL TRUSTEE ELECTIONS—QUALIFICATIONS OF ELECTORS

**QUESTION:** Was the 1947 act with reference to the qualifications of school trustees modified so that all qualified voters can vote in a county-wide election?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The only eligibility requirement for the office of trustee is that he be an elector of the district. (See section 230.37 of the statutes.)

It is more than likely that the correspondent, in raising the question, intended to inquire as to the qualifications of a voter or elector in the biennial school district election rather than the qualifications of a trustee.

The election to be held in November of this year is a regular biennial school district election. The qualifications for an elector for such elections are set out in section 236.32 (2) (d) as follows:

"All qualified electors residing within any school district in the State of Florida whose voting registration is in that district, who pay a tax on real or personal property within the district shall be entitled to vote in this election."

The same definition of an elector for a school district election is set out in section 227.13 (6).

On several occasions I have construed section 236.32 (2) (d). The last opinion on the subject was dated August 18, 1945, No. 045-247, from which I quote:

"Section 10, Article XII, of the constitution authorizes the legislature to provide, (1) for the division of any county into convenient school districts; (2), for the biennial election of three school trustees who shall hold their office for two years and who

shall have supervision of all schools in the district; and (3), for the levying and collection of a district tax for the exclusive use of the public free schools within the district, whenever a majority of the qualified electors thereof who have paid a tax on real or personal property shall vote in favor of such levy. It will be observed that the constitution appears to require that the elector be a taxpayer only when the question submitted is under (3), that is, the levy of a district tax.

"There is grave doubt whether Section 236.32(2)(d) is constitutional in so far as it appears to require that an elector be a taxpayer in order to vote on questions other than levying and collection of a district school tax. However, until our court has held such statute unconstitutional in that respect, it is the duty of the school and election officials to follow the statute and limit the voting to those electors who pay a tax on real or personal property within the district. The statute definitely implies such restriction. In the absence of such court ruling, a qualified elector in all biennial school district elections, as set out in Section 236.32, is an elector residing within the district and whose registration is in such district and who pays a tax on real or personal property within the district. Obviously the words 'qualified elector' exclude those persons who for various causes and reasons, such as set out in Section 98.01 of the statutes, are denied the right to vote in any election."

See also *State ex rel. Landis v. Board of Public Instruction of Hillsborough County*, 188 So. 88.

The qualifications of an elector for the school district election to be held in November of this year are the same as heretofore; the 1947 act made no changes in the qualifications of voters in the biennial school district elections.

November 1, 1947.—047-372.

#### SCHOOL DISTRICT ELECTION—QUALIFICATION OF ELECTORS

**QUESTION:** Where a husband or wife is duly qualified to vote in a regular biennial school district election, under section 236.32 (2) (d), Florida Statutes, 1941, may the spouse of such person also vote in such election without having paid a tax upon real or personal property within the district?

*To Mrs. Eva Baker, Supervisor of Registration, Bristol, Florida:*

The qualifications of the spouse of a qualified elector for a school trustee election must be determined entirely separate from those of his or her wife or husband. The mere fact that one spouse is qualified does not establish the qualifications of the other. It would, therefore, follow that the payment of taxes by either the husband or wife cannot be considered in determining the qualifications of the other spouse as an elector in such elections.

When a statute requires the payment of a tax on real or personal property within the district as one of the qualifications, it has reference not to the person actually making the payment but to a person paying taxes on his own property or for whose account such taxes are paid. If title to property stands in the joint name of husband and wife, the payment of a tax assessed against such property would be a payment of taxes for the account of both husband and wife, but if title is in only one of them, then the payment would be for the account of that one alone.

From the foregoing observations it appears that the question should be answered in the negative.

September 16, 1947.—047-306.

#### TRUSTEES—ELECTION—LISTING OF CANDIDATES

**QUESTION:** In the election of school trustees for the newly consolidated tax school district No. 1, to be held in November 1947, should the candidates be listed on the ballot in one county-wide group and alphabetically, or should they be listed by the county board member residence districts in which they reside?

*To Mr. Fred R. Wilson, Attorney for Seminole County Board of Public Instruction, Sanford, Florida:*

The 1947 amendment of section 230.06 provides for five county board member residence districts in each county.

Sub-paragraph 3 of section 230.34, as amended by section 12 of chapter 23726, acts of 1947, providing for the consolidation of all tax school districts into one, reads as follows:

"Three trustees for said 'Special Tax School District Number 1' shall be elected by the qualified electors of said county at the time and place prescribed by or fixed pursuant to law, but not more than one trustee shall come from any one residence district for which a county board member is provided for by law. The persons qualified to hold such office and who receive the greatest number of votes cast for election of trustees, subject to the limitation prescribed above, shall serve for the ensuing two years as trustee for said school district."

It will be observed that three trustees shall be elected by a county-wide vote but that not more than one of them may come from the same county board member residence district.

Section 102.39 requires that in all primaries the names of candidates be printed on the ballot in alphabetical order according to surnames, but neither the school statutes nor the general election law sets up the order in which the names of candidates shall be printed on the ballot at elections.

The candidates for trustees do not run in groups; each runs against each of the others on a county-wide basis.

It is my opinion that candidates should be listed in one county-wide group and, consistent with long established custom, in alphabetical order according to their surnames.

August 21, 1947.—047-273.

#### BOARD MEMBER DISTRICTS—ESTABLISHMENT OF DISTRICT—TRUSTEE

**QUESTIONS:** 1. Is it necessary that the county board establish county board residence districts, as authorized in amended section 230.06, prior to the November, 1947, school district election?

2. Does the county board have authority to divide the county into five county board member residence districts, and if so, within what time must such division be made, and may such districts differ from the election districts for county commissioner?

*To Mr. Jay Johnston, Attorney for Board of Public Instruction, Osceola County, St. Cloud, Florida:*

It is not necessary for the county board to establish county board member residence districts prior to the 1947 school district election. The provision in section 230.34, as amended, provides that not more than one trustee shall come from any one residence district for which a county board member is provided by law. Reference is made to opinion No. 047-275 of



this date, which indicates how the residence districts may be identified in either event, that is, if the county board shall have established the districts, or if they shall not have established the districts.

The county board has the authority to divide the county into five county board member residence districts, and they may be different from the election districts for county commissioners. This is authorized by section 230.06, but if the county board wishes to establish these residence districts it must do so on or before January 1, 1948, under the terms of that section.

(See 047-275)

August 21, 1947.—047-275.

#### TRUSTEES—METHOD OF ELECTION—RESIDENCE REQUIREMENTS

QUESTIONS: 1. For purposes of the school trustee election in November, 1947, how should the list of qualified electors provided by section 236.32(2) be set up? More particularly, should the list be a single list for the entire county as one school district or should it be a separate list with respect to each of the presently existing school districts or should it be a separate list with respect to each of the various election precincts?

2. At the trustee election should there be a single polling place for the county as a whole or should there be a polling place for each of the presently existing school districts or should there be a polling place for each of the various election precincts?

3. In addition to the foregoing, what other procedure is to be followed in the election of trustees?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 12 of chapter 23726, Laws of Florida, 1947, amending section 230.34 of the statutes, consolidates all tax school districts of the county, as well as other county territory not included in any school district, into one special tax school district which is co-extensive with the boundaries of the county. Nothing remains to be done to effect consolidation. The only thing required is the election of trustees and the fixing of the millage for that new county-wide tax school district.

Section 230.34, as amended by the 1947 act, in sub-paragraph 6, provides that insofar as applicable and consistent with the provisions of the chapter and when not in conflict therewith, the provisions of the general law of the state relating to school districts and to the consolidation of school districts shall be applicable to the newly created special tax school district Number 1. This has reference to section 236.32(3) which provided procedure for consolidation of special tax school districts prior to the 1947 act. In turn, section 236.32(3) provides that the procedure for calling, holding, conducting and canvassing the results of an election for consolidation of districts shall be the same as the procedure for holding any biennial school district election, except as otherwise provided therein. The procedure for regular biennial school district elections is set up in section 236.32(2) and among other things provides that school district elections shall be held and conducted in the manner prescribed by law for holding general elections, except as otherwise provided in chapter 236 of the statutes.

Accordingly, reference is made to chapter 23726, Laws of Florida, 1947, section 12; next, to section 236.32(3); next, to 236.32(2); and finally to the general election laws, to supply complete procedure for holding the school district election next November. These require the following answers to the foregoing questions:

Present tax school district lines may be completely disregarded at the November election. The election in November is to select trustees and fix the millage for the new district, and present district lines have no bearing one way or the other on those questions. The list of qualified electors should be set up separately for each election precinct. A voting place should be designated for each election precinct. The election of trustees and fixing the millage for the new district should be conducted in the same manner as at the regular biennial district election. The three persons receiving the highest number of votes cast for election of trustees are the trustees for the ensuing two years. It is to be remembered, however, that section 12 of chapter 23726, amending section 230.34, provides in sub-paragraph (3) that not more than one trustee may be elected from any one county board member residence district. For the purpose of identifying the county board member residence districts, such districts are those which may have been established by the county board in pursuance of section 230.06, as amended by section 6 of chapter 23726; but if the county board shall not have divided the county into county board member residence districts, the county commissioner election districts would control.

December 5, 1947.—047-404.

#### TRUSTEES—REQUIREMENTS FOR TRUSTEE ELECTION

**QUESTION:** Under the circumstances and conditions as described below, what are the results of the voting for trustees?

*To Honorable Colin English, State Superintendent of Public Instruction:*

It appears, from the request for opinion, that in canvassing the returns following the recent biennial tax school district election held on November 4 in a precinct in one of the counties of the state, the county board discovered the following:

(a) Only twelve names appear on the election officials' list of persons actually voting, but there were fourteen ballots cast; it is thought that the election officials may have inadvertently overlooked listing the names of two persons who voted.

(b) Votes were cast for four persons for trustee, two of them receiving 14 votes each, one, 12 votes, and one, 2 votes; none of these four persons are registered in the district and none of them pay a tax on real or personal property in the county.

(c) There were other irregularities which it is not necessary to mention.

Section 230.37 sets up the qualifications of a trustee as follows:

"Trustees for any school district shall consist of three members who are qualified electors in the district and who are elected biennially for two-year terms by vote of the qualified electors of the district."

"Qualified elector" is defined in section 236.32(2)(d) and also in section 227.13(6); the latter section reading as follows:

"An elector qualified to vote in any school district election is any qualified elector whose voting registration is in the school district where said election is being held, who pays a tax on real or personal property within such district."

It will be observed that to be eligible for the office of trustee, a person must have the qualifications of an elector under the general law, and in addition thereto, must be registered in the school district in which he resides and must be a person who pays a tax on real or personal property in that school district.

None of the four persons voted for in this district were eligible for the office of trustee because they are not qualified electors within the

meaning of the quoted section of the school code. Accordingly, none of the votes for trustee in this precinct should be counted.

There appear to have been other irregularities including the voting for the millage levy, but I do not understand that the voting for millage in this precinct would materially change the result of the vote for millage from the whole district. If the vote in this precinct on the millage should affect the results of the whole district vote and further opinion is desired, I shall be glad to consider it.

December 4, 1947.—047-402.

TRUSTEE ELECTION—TIE VOTE FOR TRUSTEE—SPECIAL  
SCHOOL ELECTION

QUESTION: In the biennial school district election November 4, in one of the counties, the largest number of votes for any trustee was 20 in school board member district No. 1; the next largest was 10 in district No. 3; three different people received the next highest number of votes, which was 2, these being residents of districts other than 1 and 3; two of these persons who received only 2 votes have signed statements relinquishing any right to the office as a result of the election and requested that their names not be included on the ballot in any special election which might result from the tie vote. Can the third person who received 2 votes be declared elected a trustee?

*To Honorable Colin English, State Superintendent of Public Instruction:*

I have answered the foregoing question in an opinion of December 7, 1945, No. 045-379, and in another opinion of November 15, 1943, No. 043-305. I reaffirm what was said therein on the same situation, that is, where there is a tie vote, there is no election. Consequently, in the absence of an authorizing statute, the several persons who received the same number of votes cannot by lot, or agreement, or withdrawal, after the attempted election, give the office to any one of them. (29 C.J.S. 354.) In the case mentioned in foregoing question, the withdrawal of the two persons who received two votes each does not result in election of the third person who received two votes.

Section 236.32(2) (f) of the school code provides that the three persons receiving the highest number of votes cast on the ballot for the election of trustees shall serve for the ensuing two years as trustees of the district. In its provisions for school district elections the school code fails to provide procedure in the event of a tie vote in the election of trustees, and, therefore, under section 236.32(2) (a) the law for general elections applies. That is found in section 99.48 of the statutes. The latter section very simply requires, in the event of a tie vote, that another election shall be held on the order of the governor as in other cases of special elections. Application should be promptly made to the governor for an order calling a special election. Only a resident of districts numbered 2, 4 or 5 will be eligible in view of the fact that a trustee has been elected from each of the districts, Nos. 1 and 3. The election should be held as promptly as possible.

January 10, 1948.—048-16.

TRUSTEE ELECTION—SPECIAL ELECTION—WITHDRAWAL OF  
CANDIDATE

QUESTION: Where each of three candidates for the office of school district trustee received the third highest number of votes for trustee in a recent biennial school district election, and each of them has now withdrawn his name as a candidate for the office, may the third trustee for the new county-wide school district be appointed by the county board?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The only difference in the present situation and that on which the opinion of December 4 (No. 047-402), was rendered is that each of the three candidates has now withdrawn, whereas, in the opinion of December 4 it was stated that two only had withdrawn.

It appears from the county superintendent's letter that in view of the "withdrawal" of the three former candidates, he considers that there are now no candidates' names to be placed on the ballot. I am afraid he misunderstands the effect of the tie vote. The tie vote resulted in no election, and none of the three candidates who received the same number of votes acquired any right whatsoever in any special election, or otherwise. It makes no difference whatever whether any or all of those three candidates have withdrawn. The opinion of December 4, has exactly the same application to the present situation as it had to the facts as they then existed. In the opinion of December 4, I held that a special election would be necessary. Candidates in that special election should be nominated in exactly the same manner as they are nominated for any regular biennial school district election. See section 230.39, Florida Statutes, 1941. As nearly as possible, the special election should be held and conducted in the same manner as a regular biennial school district election. The statutes do not permit the county board to appoint the trustee in such a case as this.

October 6, 1947.—047-316.

SCHOOL TRUSTEE ELECTION—NOTICE OF ELECTION—  
ADVERTISING BY BOARD

QUESTION: Where a county board has failed to begin publication of notice of the regular biennial school district election, and insufficient time remains to publish between this date, October 6, and the first Tuesday after the first Monday in November, may they lawfully hold the election on the first Tuesday after the first Monday in November of this year without the full statutory publication?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The statutes fix the date for the regular biennial school district election on the first Tuesday after the first Monday in November of odd-numbered years. (Sections 230.38 and 236.31.) Section 230.39 provides that the county board shall publish a notice of election once each week for four successive weeks, beginning not more than 45 days nor less than 30 days prior to the date set for the election. It is too late now to fully comply with the requirements of the last mentioned statute because it is less than 30 days from this date to the first Tuesday after the first Monday in November, which falls on November 4 this year.

The courts are practically unanimous in holding that in cases of general elections, as well as in cases where the statutes definitely fix the date for holding the election in question, statutory requirements of published notice of the election are not mandatory but merely directory, and that failure to strictly comply with the statutory requirements as to publication would not invalidate the election if held on the date specified by statute.

The Supreme Court of Florida is in accord with that line of decisions. In *State v. Burbridge*, 24 Fla. 112, 3 So. 869, the court quotes Judge Cooley's Constitutional Limitations to the effect that the notice is merely additional publicity and that the right to hold the election comes from the statute and not from the official notice. The court also said: "Where the statute itself provides the time for the election to fill an office for an entire term, the people are charged with notice of this time."

These and the decisions of other courts and authorities require the conclusion that the publication of notice is merely directory and failure



to completely comply in regard to the number of publications or length of time of publication would not invalidate the biennial school district election if held on next November 4. However, the county board should now comply as fully as possible by publishing each week prior to the election.

October 18, 1947.—047-347.

#### BALLOT BOXES—DELIVERY OF BOXES—COUNTY BOARD RESPONSIBLE

QUESTION: Who is legally responsible for delivering the ballot boxes for the biennial district trustee and millage elections?

*To Honorable Damon Hutzler, Superintendent of Public Instruction, Brevard County, Titusville, Florida:*

The County School Board is in complete control and has supervision of the biennial tax school district elections. (See section 236.31.) Accordingly, the county board is responsible for the delivery of the ballot boxes for the election. The county board may do this by any appropriate means, and ordinarily all such duties are performed by the board through the county superintendent, who is the executive officer of the board.

July 19, 1947.—047-220.

#### DUTIES OF SUPERINTENDENT—COMPENSATION FOR BOARD MEMBERS

QUESTIONS: 1. As of what date is the compensation authorized by chapter 24261, Laws of Florida, 1947, payable to members of the Board of Public Instruction of Hendry county?

2. Is a county superintendent who is a physician prohibited by section 230.30, as amended by section 11 of chapter 23726, Laws of Florida, 1947, from practicing his profession?

*To Dr. C. E. Weaver, Superintendent of Public Instruction, LaBelle, Florida:*

Chapter 24261, Laws of Florida, 1947, a local act for Hendry county, fixes compensation of school board members at six hundred dollars per year, payable in monthly instalments of fifty dollars. The act became a law on June 16, 1947. The school board members are entitled to compensation at the rate fixed in the act, beginning on June 16—in other words, for one-half month in the month of June, 1947.

It is stated that the superintendent of public instruction is the only physician in LaBelle and that it would be impossible to get another doctor to serve that community; that said superintendent has been elected twice by the people who knew that he gave medical service to those in the community requiring it; that in no manner does the medical practice interfere with the duties as county superintendent.

Section 230.30, Florida Statutes, 1941, as amended by section 11, chapter 23726, Laws of Florida, 1947, reads in part as follows:

“Provided, that the position of county superintendent in each county shall be considered a full time position.”

It may be presumed that the Legislature would have used different language if it had intended to prohibit a county superintendent from performing any work other than that of his office. In my opinion, the language used means, among other things, that it is a full time position, for pensioning laws, etc. The quoted 1947 amendment of section 230.30 made little, if any, change in the law. In an opinion of December 4, 1944, No. 044-336, rendered prior to the amendment of section 230.30, I answered

a question with reference to the amount of time a county superintendent should devote to his work, and there said:

"There are no hours fixed by the statutes for the performance of duties of such county officers, but, by long practice and custom, the public officer is supposed to attend to his duties during the usual and normal business hours or so much of those usual business hours as may be necessary to fully perform his duties. He is a public servant and, whatever his duties to the public may be, they should be performed at such times as will meet the reasonable convenience of the public. He should refrain from outside activities which would interfere with the competent performance of his duties."  
That is still the law.

It is my opinion that section 230.30, as amended, does not prohibit the practice of aforementioned profession in the manner and under the circumstances stated in request for opinion, provided the rule set out in the foregoing quotation from the opinion of December 4, 1944, is observed.

January 30, 1948.—048-29.

#### COUNTY SUPERINTENDENT—QUALIFICATION—CANDIDATE

QUESTIONS: 1. What kind of certificate is required to qualify as a candidate for the office of county superintendent in the election to be held this year?

2. What are the duties of the clerk of the circuit court as clerk of the board of county commissioners in regard to placing the name of prospective candidates for the office of county superintendent on ballots in the election to be held this year?

*To Miss Kate Gillis, Clerk of the Circuit Court, Walton County,  
DeFuniak Springs, Florida:*

Both questions involve the construction of section 230.25, Florida Statutes, 1941, as amended by chapter 23726, Laws of Florida, 1947. That amended section of the statute reads as follows:

"230.25. QUALIFICATIONS OF COUNTY SUPERINTENDENT. In order to be eligible for nomination, election or appointment to the office of county superintendent in any county in Florida, in addition to meeting requirements now prescribed by law for candidacy for public office, a person shall hold a valid Florida graduate certificate based upon graduation from a four-year course in a standard institution of higher learning; Provided, that the provisions of this section shall not apply prior to January 1, 1952, to any person now legally holding the office of county superintendent in any county in Florida. Before any person may become a candidate for or have his name placed on the ballot for nomination or election to the office of county superintendent he shall, within the time prescribed by law for filing other credentials, file said certificate with the clerk of the circuit court in his capacity as clerk of the board of county commissioners of the county in which he proposes to become a candidate. It shall be a misdemeanor for the clerk of the board of county commissioners or for the board of county commissioners to place the name of any prospective candidate for the position of county superintendent on the ballot until the requirements prescribed herein have been met."

The requirements that a candidate for the office of county superintendent shall hold "a valid Florida Graduate certificate based upon graduation from a four-year course in a standard institution of higher learning" means that the candidate must hold a Florida teacher's certificate which

is based upon graduation from a standard institution of higher learning. This means that any valid Florida teacher's certificate by whatever name designated, but which is based upon graduation from a four-year course of a standard institution of higher learning, complies with the statute. (See also section 231.20.)

The amended section quoted herein requires a candidate for the office of county superintendent who is not now county superintendent to file his qualifying teacher's certificate with the clerk of the circuit court in the county in which he proposes to become a candidate. Neither the clerk nor the board of county commissioners may place the name of such candidate on the ballot unless the certificate is filed, and, under the statute, it is a misdemeanor if they do so.

It will be observed that the statute exempts any present incumbent of the office from the provisions thereof, and that exemption continues until January 1, 1952. In other words, a present incumbent of the office of county superintendent need not hold such a certificate in order to qualify as a candidate in the elections to be held this year. Whether such discrimination between different candidates is constitutional or unconstitutional is not for me to decide—only the courts can settle that question. Until a court of competent jurisdiction holds the statute unconstitutional, it is the duty of public officers to comply with the statute. Accordingly, until a competent court holds the statute unconstitutional, it will be the duty of the clerk of the circuit court to refuse to place the name of any prospective candidate for the position of county superintendent on the ballot until he files with said clerk, within the time prescribed by law for filing other credentials, the qualifying teacher's certificate as described, unless he now holds the office of county superintendent.

February 21, 1948.—048-67.

#### VALID CERTIFICATE—COUNTY SUPERINTENDENT—ELECTION REQUIREMENT

QUESTIONS: 1. In section 230.25, Florida Statutes, 1941, as amended by chapter 23726, Laws of Florida, 1947, what does "a valid Florida graduate certificate based upon graduation from a four-year course in a standard institution of higher learning" include?

2. Who is authorized to issue such certificates?

3. By what means are the county commissioners to know that such certificate is valid?

4. Do the qualifications required by that section apply to all candidates for the office of county superintendent in the election of 1948 other than the person now lawfully holding the office of county superintendent?

*To Mr. H. A. Rider, County Attorney, LaBelle, Florida:*

The first question has been answered in an opinion of January 30, 1948, No. 048-29.

The certificates are issued by the state superintendent of public instruction. (See section 231.17, Statutes of 1941, as amended.)

The third question makes inquiry as to how the county commissioners and the clerk may recognize the type of certificate required by the statute and whether or not it is valid and unexpired. Information obtained from department of education indicates that the following types of teachers' certificates are based upon graduation from a four-year course in a standard institution of higher learning required of candidates for office of county superintendent under section 230.25, Florida Statutes, 1941, as amended in 1947:

Advanced Post Graduate Certificate;  
Post Graduate Certificate;

Professional Certificate if issued since May 1, 1946.

(All of the above types of certificates which have been issued are still outstanding and valid.)

Graduate Certificate;

Provisional Certificate;

Provisional Graduate Certificate.

In addition to the foregoing, there are two other types of certificates which may or may not be based upon graduation from a four-year course in a standard institution of higher learning. They are:

Temporary Certificates;

Life Graduate State Certificates.

The certificates will usually show on their face whether or not they have been based upon graduation from a four-year course in a standard institution of higher learning.

To determine whether the certificate is still valid and unexpired, reference can be made to the face of the certificate, upon which is usually found either in the upper righthand corner or upper lefthand corner a statement as to how long the certificate is valid. Some of the certificates can be extended or renewed. The extension or renewal is by endorsement on the certificate, usually on the back thereof.

The office of the state superintendent of public instruction has a list of every outstanding teacher's certificate. If there is any doubt about whether the candidate's certificate is based upon graduation from a four-year course in a standard institution of higher learning or whether or not his certificate is still valid and unexpired, the question can be determined by communicating with the state superintendent of public instruction.

The fourth question is answered in the affirmative.

October 7, 1947.—047-319.

#### SCHOOL CODE—REPEAL OF LOCAL SCHOOL LAW

QUESTION: With the enactment of chapter 20097, Laws of Florida, acts of 1939, beginning in 1940 the regular biennial school district elections in Putnam county for the election of school trustees for special tax school districts and the fixing of millage therefor have been held on the first Tuesday after the first Monday in November in even-numbered years. At the general election in 1946, in pursuance of said act, trustees were elected and millage fixed in said county in accordance with the usual practice at the biennial school district election. (1) In view of the provisions of section 230.34, Florida Statutes, 1941, as amended by section 12, chapter 23726, Laws of Florida, acts of 1947, creating county-wide special tax school district No. 1 and providing for election of trustees therefor and millage, do the provisions of chapter 20097 control the times for the holding of such regular biennial elections in said county, or are the times for the holdings of such elections controlled by the relevant provisions of the school code of Florida?

(2) If the provisions of chapter 20097 control such elections in said county, may the county board consolidate all the districts of the county into one district by resolution, but hold the elections in the manner and time prescribed by chapter 20097?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Chapter 20097, and chapter 19355, Laws of Florida, acts of 1939 (school code as originally enacted), each became laws without the governor's approval on June 12, 1939. Section 6 of the former chapter provided that such act should take effect immediately; while section 111 of the latter act provided that the same should take effect on July 1, 1939.



Conflict exists with respect to certain provisions of these two acts: (1) the year for the holding of the regular biennial school district elections; and (2) the qualifications of electors who might participate in such elections. When irreconcilable conflict exists between provisions of acts passed at the same session and which became laws on the same day, it has been held that a provision in one of such laws making it effective at a later date than the other, indicates legislative intent that the provisions of the law last effective should prevail. (See 59 C. J. 1055.) It would appear that chapter 19355 repealed chapter 20097.

If such probable repeal were ignored, it would seem that the provisions of section 230.34, Florida Statutes, 1941, as amended by section 12, chapter 23726, Laws of Florida, acts of 1947, creating the entire county into special tax school district No. 1, effective January 1, 1948, and providing for the election of a governing body for such district, are in irreconcilable conflict with chapter 20097, and must prevail.

An additional grave reason why chapter 20097 should not be considered effective is found in the fact that such act prescribes qualifications for electors who are entitled to participate in such an election not in harmony with the provisions found in article VI, section 1, as limited by article XII, section 10, pertaining to qualifications for such electors. (See *State ex rel. Landis vs. County Board of Public Instruction of Hillsborough County, et al.* (Fla.), 188 So. 88.)

In view of the foregoing, in my opinion the questions are properly answered in their numbered order as follows:

(1) Since it appears, for the reasons aforesaid, that the provisions of said chapter 20097 are no longer effective, there should be held in Putnam county, Florida, on November 4, 1947, an election for the election of school trustees for new special tax school district No. 1 in said county, effective January 1, 1948, and for the fixing of millage for said district. It is noted that insufficient time remains for the giving of notice of such election for the full period of time required by section 230.39, Florida Statutes, 1941; however, in a recent opinion of this office (No. 047-316), I held that the requirements of said section were not mandatory but were directory, and remarked that, "the county board should now comply as fully as possible by publishing notice each week prior to the election."

(2) In view of the answer to the first question, it is obvious that an answer is unnecessary to the second question.

June 10, 1947.—047-167.

#### BOARD—LIABILITY FOR TORT—INSURANCE

**QUESTION:** May a County Board of Public Instruction use county school funds to pay the premium on a policy insuring the board against liability for personal injury or property damage resulting from operation of automotive vehicles other than school buses, when such vehicles are owned by the board, or operated by the board under contract or hired, or where they are owned by school officers or employees and used in connection with school duties?

*To Honorable Bryan Willis, State Auditor:*

Limited liability in connection with the operation of school buses is provided by section 234.03, Florida Statutes, 1941, which requires insurance covering liability for certain damages caused by the operation of school buses. Aside from that, a County Board of Public Instruction, as such, enjoys governmental immunity and is not liable for its torts.

Since a school board is not liable, there is no authority for insurance against personal injury or property damage liability except to the extent authorized for school buses under section 234.03. A school board may not lawfully use school funds to pay premiums for any liability insurance except such insurance on school buses. The question is answered in the negative.

May 25, 1948.—048-172.

COUNTY BOARD—LIABILITY FOR TORT—INJURY OF STUDENT  
PARTICIPATING IN ATHLETICS

QUESTION: Is the County Board of Public Instruction liable for hospital and medical expenses of a pupil who injured his leg in a physical education class?

*To McClure & Turville, Attorneys for County Board of Public Instruction,  
Florida National Bank Bldg., St. Petersburg 5, Florida:*

The request for opinion states that the injury occurred while the pupil was running low hurdles; he stumbled, fell, and one leg was quite seriously injured.

In 1944, I went into the question very thoroughly, following the death of a student as a result of an accident in one of the public schools of this state. Attorney General's Opinion No. 044-30 dated January 24, 1944, gives a very brief synopsis of the law. It will be observed that the courts very generally hold that school boards have immunity against tort actions and are not liable in damages for such injuries. Authorities cited in aforementioned opinion state that the immunity is based upon different grounds in different jurisdictions. An extensive and further discussion on the question can be found in 160 ALR 7.

There is a Florida case, *I. W. Phillips & Company vs. Board of Public Instruction*, 122 So. 793, in which the court held that a county board was not liable in tort because the Florida Constitution requires that all moneys of boards of public instruction may be disbursed "solely for the support and maintenance of free public schools." In that case the court did not extend its discussion to governmental immunity as such.

I do not discuss the question of whether or not school board members may be personally liable. That is a matter on which the advice of private counsel may be obtained. The Florida Supreme Court has rendered several opinions on that problem.

September 18, 1947.—047-304.

PARENT-TEACHER ASSOCIATION FUNDS—ACCOUNTING OF  
FUNDS

QUESTION: Are funds derived from parent-teacher association activities or projects for profit, school funds, and therefore, subject to deposit, accounting and disbursement like other school funds, when the activities or projects were held or conducted on public school premises?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The funds arising from activities or projects conducted or sponsored by the parent-teacher association, or for which that association is exclusively responsible, and which are operated for profit, are funds of the association and are not school funds, even though the activities may be held on school premises.

The question is answered in the negative.

December 17, 1947.—047-410.

PARENT-TEACHER ASSOCIATION—ACCOUNTING FOR PUBLIC  
FUNDS

QUESTION: If a parent-teacher association operates a lunchroom in a public school, not for profit but as a worthy service to pupils and teachers, at a reasonable cost to them, employing all lunchroom personnel and

paying their salaries exclusively out of lunchroom funds, and if it collects and disburses all funds without assistance of any of the school instructional personnel, is it required by law that such funds be accounted for under "Accounts and Reports" in section 236.02, "Requirements for Participation in Foundation Program Fund," sub-section 1, chapter 23726, acts of the 1947 Legislature?

*To Honorable Judson B. Walker, Superintendent of Public Instruction, Orlando, Florida:*

In the request for opinion it is not stated what the arrangement is with the PTA nor where the capital comes from with which the program is originally financed, but I assume that the school lunches are supplied under a contract between the county board and the PTA whereby the latter agrees to supply the required lunches either at a fixed price for each kind of lunch or for a total lump sum consideration. This would in effect amount to the PTA's supplying the lunches as a contractor and not as agent, or employee, of the county board. If the lunches are handled in the manner assumed, the only accounting required by the statute would be accounting by the county board showing the money paid to the PTA under the contract. The reason for this is that under such arrangement the money paid to the PTA becomes its money and thereupon ceases to be public funds.

September 20, 1948.—048-305.

#### LUNCHROOM FUNDS—PTA ACTIVITIES—BOOK STORES

QUESTIONS: 1. Are funds derived from school entertainments and school carnivals when sponsored by the PTA to be classified as internal accounts?

2. Are funds derived from school lunchrooms when operated by the PTA to be classified as internal accounts?

3. May a school principal operate a bookstore, or handle the sale of work books, at a profit, provided the profits are used for buying equipment, etc., for the benefit of the school?

4. May the PTA handle the sale of work books, or operate a bookstore for profit, provided the profits are used for buying equipment, etc., for the benefit of the school?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Since my earlier consideration of the problem of school lunches and entertainments, the State Board of Education, on June 1, 1948, adopted certain regulations in regard to the school lunch program and other school activities. Among those regulations are the following:

"1. Internal Accounts. All funds derived from school entertainments, athletic contests, school lunchrooms, and from any and all activities of the school involving school property or students by which funds are collected and disbursed shall be classified as Internal Accounts, and subject to all regulations herein contained.

"2. Under Direction of County Board. All school lunch programs and all other activities and projects for which individual school accounts are kept shall be construed as school projects under the direction of the County Board of Public Instruction."

From these regulations, it is clear that the school lunches and school entertainments, carnivals, etc., must be handled as school projects, under the direction of the County Board of Public Instruction, classified as internal accounts, and, as such, subject to accountability like all other school funds. This requires an affirmative answer to the first and second questions.

School supplies are handled by private business, and book stores should not be operated on the school premises, except perhaps in those schools so located as to make it very inconvenient for the school children to get their school supplies at a store. Where such conditions exist, it is my opinion that the county board may authorize the operation of a book store by a school principal or other member of the school personnel. When so operated it is a school project under the foregoing regulations and its funds are subject to accountability like other school funds. For the same reason, if operated by the PTA, it must be under the authority of the school board as a school project, and all funds accounted for as school project funds.

July 29, 1948.—048-249.

#### ATTORNEY'S FEES FOR DEFENDING COUNTY SUPERINTENDENT

**QUESTION:** Does a school board have legal authority to pay attorney's fees to be incurred by a county superintendent in defense of an action for malicious prosecution brought against him individually where all acts of the county superintendent in reference to such suit were done solely in the performance of his official duties and with the knowledge and consent, and under the direction of the school board?

*To Honorable Colin English, State Superintendent of Public Instruction:*

I cannot give a complete answer to the question as submitted because it assumes certain facts which may or may not actually be true, and what is said herein is not to be construed as holding that the county board may or may not pay the attorney's fees in this particular case. I will make this observation:

Assuming that the acts complained of were performed under the directions of the county board, and that the county superintendent was free of any personal, unlawful conduct in connection with the acts complained of, it is my opinion that the county school board would have authority to pay reasonable attorney's fees incurred in defense of the action.

June 19, 1947.—047-170.

#### HOLIDAYS—AUTHORITY TO DECLARE

**QUESTION:** Is a County Board of Public Instruction required to include all legal holidays of the state in its list of official holidays for administrative personnel?

*To Honorable Colin English, State Superintendent of Public Instruction:*

This opinion does not relate to "school holidays," that is, legal or other holidays falling on a regular school day and on which day school is not in session. The manner of determining such "school holidays" on which school is not in session is provided in the statutes and state board regulations. The question here presented, and the answer, is restricted to holidays for administrative personnel only.

Section 683.01, Florida Statutes, 1941, after naming (in addition to Sundays), fourteen or fifteen memorable days as legal holidays, adds: "shall for all purposes whatsoever as regards the presenting for payment or acceptance and of the protecting and giving notice of dishonor of negotiable instruments, be treated and considered as public holidays." In other words, when the day for the performance of any act required as to negotiable instruments falls on a legal holiday, the time for performance is postponed to the next secular or business day. In *Russ v. Gilbert*, 19 Fla. 54, referring to legal holidays, the court said:

"Courts and business are not inhibited on those days."

In this state, the law does not require cessation of work or business on the legal holidays named in the statute, nor the observance of such holidays in any manner whatsoever.



The county board has ample authority under sections 230.22(1), (2), (5) and 230.23 (18) to determine and fix the days which shall be holidays for the administrative personnel, selecting as few or as many as they deem proper and to the best interest of the schools. There is no legal obligation to include all or any of the legal holidays named in the statute.

November 28, 1947.—047-393.

#### BOND ISSUE—DELIVERY OF BONDS IN ESCROW—DATE OF ISSUANCE

QUESTIONS: 1. In the Branford special tax school district No. 4, by proper petition, and the necessary advertising by the Suwannee County School Board, a bond election was held on November 10, 1947, and bonds voted by a large majority of freeholders. The question is, can the bonds be sold locally, and in the State of Florida, subject to completion of validation after December 31, 1947?

2. If money is placed in the bank in escrow for purchase of bonds, and if bonds are also placed in bank for delivery upon validation, does this satisfy the legal requirements for delivery of bonds? If not, what constitutes delivery of bonds?

*To Honorable Colin English, State Superintendent of Public Instruction:*

In an opinion rendered on September 12, 1947, No. 047-301, I held that the filing of the petition for validation of bonds and entry of decree after January 1, 1948, would not affect their validity if they were issued prior to January 1, 1948. I also pointed out in that opinion that the Florida Supreme Court held that bonds are ordinarily tested as of the date of issue, and unless the context clearly indicates otherwise, date of issue is the date of delivery to the purchaser. By "delivery" the court meant delivery of possession, actual or constructive, to the purchaser. It is my opinion that our court in holding that "issuance" requires delivery of bonds did not intend to require final and completed delivery into the physical possession of a purchaser.

If the county board, following the statutes, has offered tax school district bonds for sale, has received and accepted a bid, has placed the executed bonds with a bank in escrow, the purchaser at the same time depositing the purchase price with the same escrow agent, bonds and purchase price to be finally delivered when the bonds are validated, the parties, both seller and buyer, have irrevocably obligated themselves to complete delivery. The only condition is a decree validating the bonds—a matter beyond the control of either party. It is my opinion that such is actually an "issuance" of bonds. After all, "issue" or "issuance" means to put on the market, and I think the court did not intend to require more than that.

Any doubt as to whether delivery in escrow in the manner stated would satisfy the requirement of issuance prior to January 1, can be resolved in the validation proceedings wherein that question should be submitted to the court. It is probably unnecessary to add that the question can be avoided if the county board should be able to make sale and delivery of the bonds without the necessity of placing them in escrow.

December 20, 1947.—047-434.

#### STADIUM BONDS—PLEDGE OF SCHOOL MONEY—VALIDITY OF BONDS

QUESTION: May bonds be issued without vote of the freeholders where a County Board of Public Instruction agrees in writing to make up any deficit in the payment of principal and interest, such principal and interest to be paid primarily from receipts of a stadium for whose construction the bonds are to be issued?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The State Board of Education has been requested to purchase one-half of a total issue of \$40,000 of 3½ % revenue bonds proposed to be issued by the Board of Public Instruction of Putnam County, Florida, the proceeds of which it is alleged are to be used for the construction of a stadium and athletic field at the high school in Palatka. Palatka is located in present tax school district No. 1 in Putnam county. The request is that the State Board purchase the \$20,000 last maturing. The last maturing \$20,000 will be payable from 1959 to 1967. An opinion has been requested as to the validity of the proposed bonds, and their security.

It is proposed to issue the bonds under chapter 24846, Laws of Florida, 1947, a special act authorizing the Board of Public Instruction of Putnam County to construct and operate a stadium and athletic field in Palatka; to issue revenue bonds as provided by chapter 181, Florida Statutes, 1941, to pay for such construction; to fix charges for services furnished by the stadium; to provide by resolution for an annual appropriation and expenditure from any funds available under the custody or control of the Board to supplement revenues to pay principal or interest on the bonds, etc.

On petition filed in the circuit court of Putnam county these revenue bonds were validated by final decree dated December 10, 1947, recorded in Chancery Order Book 22, page 48, in the office of the clerk of the circuit court of that county.

It is proposed that the athletic field and stadium to be built with the funds derived from the sale of the bonds be used by the pupils of the school, and for baseball, football and other athletic contests for which an admission is to be charged. The county board will fix the fees, rentals, admissions, etc., to be charged the spectators, and will place the net revenues into a stadium revenue fund for payment of the principal and interest of the bonds.

In order to provide additional funds which admittedly will be necessary to pay the bonds and interest, the County Board of Public Instruction entered into an agreement with the school trustees of present tax school district No. 1 whereby they undertake to lease the project to the trustees and their successors for the use of the school children of that district, and the trustees agree to pay therefor "an amount equal to the principal and interest requirements of said revenue bonds, less the net revenue produced for rents and admissions and other charges for services that are to be made under the direction of the Board of Public Instruction of Putnam County, Florida, and paid 'into the Stadium Revenue Fund'." The agreement also proposes to make the Board of Public Instruction the trustees' agent for fixing the fees, rents, etc., to be charged to spectators. The trustees also direct the County Board to include in their annual budget for current expenses of the district, or any district succeeding to the rights, debts and liabilities of present district No. 1, funds sufficient to meet the amount agreed upon in the lease contract, and the County Board agrees to include such amount in the annual budget, etc.

Briefly stated, there will be some revenue or income from the project which, after payment of operations, maintenance, etc., will leave a net amount available to pay the principal and interest of the bonds. Realizing that such amount will be insufficient, a so-called lease contract was made with the school trustees whereby the latter agreed to make up the difference from current expense funds of the district.

Notwithstanding the fact that school trustees have no contractual capacity, no capacity to hold property under lease, no funds for disbursement, it is my opinion that under the validating statutes, all such adverse matters of law and fact would be set at rest by a final decree validating the bonds, were it not for a more serious objection to the attempted pledge of school funds to supplement revenue derived from the project. While it is true that surplus school funds, if any, in any year, not otherwise pledged, earmarked, allocated, restricted, or needed for school operation and main-

tenance might be lawfully used by the county board to help liquidate the bonds, if the county board should see fit to do so, any pledge of such funds for the payment of the bonds would be invalid under section 6 of article IX of the Florida Constitution because there had been no vote of the freeholders authorizing a bond issue, or the pledge of such funds. Any attempt to pledge, directly or indirectly, a tax, or the levy of a tax, or the pledge of any county school funds or property, would be invalid in the absence of an approving vote of the freeholders; and this is true notwithstanding any validating decree.

With reference to the net revenue derived from the project, it is my opinion that this may validly be pledged to the payment of the bonds, and any doubt there may be as to whether chapter 24846, Laws of Florida, 1947, validly authorized issuance of such revenue bonds will be set at rest by the final decree validating the bonds in event there should be no appeal from that decree or if it should be affirmed on appeal.

Summarizing—it is my opinion that the attempted pledge of school funds to supplement project revenue is unconstitutional, void, and of no effect. It is my further opinion that if and when the decree becomes absolute the revenue bonds will be valid to the extent that they are payable from revenue derived from the project, and that no other funds are validly pledged for their payment. It is my understanding that no claim has been made that revenue from the project will be sufficient to pay principal and interest of the bonds.

February 4, 1948.—048-34.

#### VALIDITY—BPI BONDS—HARDEE COUNTY

QUESTION: At a meeting on January 27, 1948, the State Board of Education purchased for investment, subject to approval of the attorney general, \$185,000 Hardee county BPI 3½% serial bonds dated 8-1-47, callable after five years, authorized to be issued under the provisions of chapter 24224, special acts of 1947, secured by pledge of race track moneys. Are these bonds valid?

*To Honorable Colin English, Secretary, State Board of Education:*

This issue, known as, "Board of Public Instruction of Hardee County, Florida, County High School Building Fund Bond Issue of 1947," was authorized by resolution of the county board of July 5, 1947. Validation proceedings were instituted in the circuit court and vigorously contested. From the decree of validation the defendants, Board of County Commissioners, appealed, and under date of November 14, 1947, the Supreme Court of Florida affirmed the decree of validation; rehearing denied December 15, 1947. (Prescott vs. Board of Public Instruction, 32 So. (2) 731.)

Questions raised and determined on appeal included the constitutionality of chapter 24224 under which the securities were issued, and alleged invalidity of the securities under sections 7, 8 and 9 of article XII of the constitution.

In addition to the determination of those questions in favor of the validity of the securities by the supreme court, the lower court made a finding that these obligations do not constitute bonds within the meaning of any constitutional or statutory provisions applicable to bonds or bonded indebtedness. That finding eliminates certain other constitutional questions which may not have been concluded by the supreme court decision. It is my opinion that these are valid obligations of the Board of Public Instruction of Hardee county secured by pledge of race track moneys as authorized by said chapter 24224.

November 17, 1948.—048-342.

BOARD OF PUBLIC INSTRUCTION—RESCISSION  
OF BUS DRIVER'S CONTRACT

**QUESTION:** At a meeting of the County Board of Public Instruction, duly assembled, there was a motion seconded and carried that a named person be appointed bus driver for a designated route. If the board should now rescind the foregoing action, will said board be obligated to pay such driver a salary for the rest of the current school year?

*To Dr. C. E. Weaver, County Superintendent, LaBelle, Florida:*

A school board is liable under a contract, which it has authority to make, in the same manner as a private person or corporation would be liable, and if it should breach such a contract, it would be liable for such legal damages as the other party could prove he suffered. In case of an employment contract the damages may or may not be the amount of the salary for the employment period—depending on the facts and circumstances.

The problem in this case is whether or not a contract was made between the school board and the named bus driver. This is no place to discuss the law of contracts, but I might remind you that a contract ordinarily consists of an offer by one party and an acceptance of that offer by the other party. When there has been an offer and acceptance of that offer, the contract is binding.

If it should happen that the county school board has a valid regulation in regard to such contracts, it would be necessary to comply with that regulation before the contract would be binding.

Again, if anything may have happened to make the holder of such a contract unfit for the job, and safety of the school children required rescission of the contract, such circumstances might justify rescission of the contract.

I cannot advise as to whether said board would be liable because I do not know all the facts and circumstances, and for that reason, nothing said herein is to be construed as holding that said board would or would not be liable in this particular case. Matters such as this should be referred to the local county school board attorney for advice and counsel in each particular case.

December 14, 1948.—048-360.

STREET CROSSINGS—SMALL SCHOOL CHILDREN—  
TRAFFIC REGULATION

**QUESTION:** Is it lawful for the County Board of Public Instruction to employ or pay the salary of a city policeman or deputy sheriff to be stationed at street intersections where traffic is dangerous to children crossing to attend school?

*To Messrs. McClure & Turville, Florida National Bank Building, St. Petersburg 5, Florida:*

The request for opinion refers to the necessity of certain kindergarten and grammar school children to cross a through-traffic-street to attend school. There are numerous similar situations in every city in the United States. It is an ordinary traffic problem which has been solved by the simple expedient of installing traffic lights, regulating speed of traffic, or placing a traffic officer on duty at the location, or a combination of these safety measures. It is no different from any other city traffic problem and is to be handled by the city police just as they would protect the citizens from



traffic dangers at any other place in the city. It is not a school responsibility, and there is no authority to spend school funds for such purpose.

The question requires a negative answer.

### PERSONNEL OF SCHOOL SYSTEM

July 30, 1947.—047-238.

#### SICK LEAVE—LOCAL LAW—CONFLICT

QUESTIONS: 1. Since chapter 24729 states "effective at once" and was a law on May 20, does this mean that on a percentage basis, teachers should receive part of these additional sick leave days for the school year ending June 30, 1947?

2. Would this action interfere with the bill passed in accordance with the Florida Citizens' Committee's recommendations which became chapter 23726 of the Florida Statutes with the governor's signature on May 20, effective July 1, 1947? This allows six days annually with a cumulative amount of 72 days.

3. Should both bills be observed by Monroe county? If only one is legal, which one? How shall the needs be estimated and still allow for this additional sick leave time, when preparing the budget for 1947-48?

4. Are both chapters 24729 and 23726 in effect legally, and if so, what would be the total number of days allowed on the two bills? Would 72 be the maximum number of days allowed to accumulate?

3. Putting the two bills together, would this indicate that a teacher should be allowed up to 16 days' sick leave a year or 10 days as the maximum; six of which would be allowed by state and four additional days borne by the county?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 231.40, Statutes of 1941, provided sick leave for the instructional staff of the public schools. It allowed five days per year, cumulative but not in excess of twenty days' sick leave to be claimed in any one year, and accumulated sick leave could not be claimed later than the end of the third year after it accrued. It also provided that half of the cumulative leave must have been earned in the same county school system.

Chapter 24729, Laws of Florida, 1947, is a local bill for Monroe county. It became a law on May 20, 1947, and purports to fix the number of days of sick leave to be allowed members of the instructional staff of the public schools of Monroe county.

Chapter 23726, Laws of Florida, 1947, which amended numerous sections of the school code, was approved by the governor on the same date that chapter 24729 became a law—May 20—but the effective date of the act was July 1, 1947. Section 22 of this last mentioned school bill amends section 231.40 of the statutes of 1941, increasing the number of annually allowable days of sick leave, the maximum number which may be accumulated, and period of time in which they may be accumulated.

There is serious doubt about the intention of the Legislature in chapter 24729. Section 1 of the act requires the county board to "grant sick leave to members of the instructional staff of such county board of public instruction of not more than ten days for and during any one year, which said sick leave shall be cumulative from year to year; provided, that not more than sixty school days of sick leave, including sick leave for the current year and accumulated sick leave for previous years, may be claimed in any one year; and, provided further, that accumulated and unused sick leave shall not be claimed later than the end of the fifth year after which the same shall have been accrued and become allowable."

Section 3 of the act provides that it shall not be "construed to repeal section 231.40 or section 231.41, Florida Statutes, 1941, nor any amendment thereof, but shall be cumulative thereto; provided, however, that for any sick leave allowed under the provisions of this act in addition to the allowance of sick leave provided by sections 231.40 and 231.41, Florida Statutes, 1941, shall be paid from the county current fund of the County Board of Public Instruction of Monroe county, State of Florida."

The title to the act reads in part: "An Act to authorize . . . and require the County Board of Public Instruction of Monroe county, State of Florida, to grant sick leave to members of the instructional staff of such county board in addition to the sick leave authorized by Sections 231.40 and 231.41, Florida Statutes of 1941."

It will be noted that in sections 2 and 3 and in the title to the act, reference is made to section 231.41 of the statutes of 1941. That section relates to illness-in-line-of-duty-leave. There is nothing in chapter 24729 which in any manner affects illness-in-line-of-duty-leave. The only change is in regard to sick leave.

As pointed out, the title to the act recites in plain words a purpose to grant the sick leave set up in the statute in addition to the sick leave authorized by section 231.40; and in section 3 of the chapter the sick leave set up in the statute is specifically said to be cumulative to the leave granted in section 231.40. "Cumulative" means, "added to." If such were actually the intent of the Legislature, it would result in an annual sick leave of ten days in addition to whatever amount of sick leave might be granted in other counties under the general act, that is, section 231.40. That would amount to sixteen days—almost ten per cent of the total annual school days. It is reasonable to assume that the Legislature intended to give the instructional staff of Monroe county ten days more sick leave than would be granted in other counties under the general law, regardless of how liberal the latter might be; yet that is what chapter 24729 appears to do if literally read. Another construction, giving a very different result, and one which might be justified under all the circumstances, would be an interpretation whereby the number of annual sick leave days is increased, but limited, to ten in Monroe county.

The general rule is that a later general act does not repeal an earlier special act regulating the same subject matter, unless the intention to do so is clear and unmistakable. But even assuming that the local act, and not the general act, is in effect in Monroe county, and that it is valid, it is practically impossible, for the reasons mentioned, to determine the legislative intent with sufficient assurance to warrant action thereon. It is a matter of considerable importance to the school authorities, the teachers, and the patrons of the public schools of Monroe county to have an exact and accurate answer to the question as to how many days of sick leave may be granted in a school year—whether six, or ten, or sixteen. The answer, under different approaches to the question, might be either of those three figures. Accordingly, I refrain from a specific answer to the question, with the recommendation that a suit for declaratory decree be filed in order that a court decision may be obtained which will be final and binding on all parties. I shall be glad to render any proper assistance in such a suit on the request of the parties concerned.

July 27, 1948.—048-251.

#### SICK LEAVE—ILLNESS OF RELATIVE—COMPENSATION OF SUBSTITUTE

QUESTIONS: 1. May the annual six days of sick leave with pay, authorized by section 231.40, because of illness of the teacher or illness or death of a father, mother, brother, sister, husband, wife, or child, include absence because of the illness of a father-in-law or a mother-in-law or other person who actually stands in loco parentis?

2. Is a teacher entitled to the difference between his salary and the amount paid a substitute teacher during the time of his absence beyond his authorized sick leave with pay?

*To Honorable Judson B. Walker, County Superintendent, Orange County, Orlando, Florida:*

It is my opinion that a more accurate interpretation of the legislative intent can be obtained by giving to the words, "father" and "mother," in section 231.40, as amended, the broad meaning of, anyone who stands in the place of a parent, including specifically a father-in-law or a mother-in-law or other person, if the father-in-law or mother-in-law or other person actually occupies the relationship of a parent to the teacher.

In an opinion of December 4, 1941, I held that the county board had no authority to pay a teacher the difference between his salary and the amount paid a substitute teacher when the contract teacher was absent beyond his lawful sick leave with pay. I adhere to that opinion.

January 31, 1948.—048-33.

#### ILLNESS—BOARD MEMBER—SALARY

**QUESTION:** May the chairman of the county board, and the county superintendent, lawfully continue to sign warrants for salary payable to a school board member who has been physically unable to attend board meetings for a year, if such physical disability should continue?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Compensation when provided by statute is an incident to the office and goes with the office. The Supreme Court of Florida has held that long continued illness and prospectively permanent illness of a public official does not create a vacancy in the office which he holds.

The courts have very generally held that the holder of an office does not lose his right to the salary payable to the holder of the office because of absence on account of illness, even though such absence may be for a protracted period of time. It is my opinion that such is the law of this state and the question is answered in the affirmative.

August 12, 1947.—047-265.

#### BASIS OF SALARY PAYMENT—EXTRA COMPENSATION FOR TEACHING

**QUESTIONS:** 1. May the County Board of Public Instruction use its own discretion in determining whether to divide a school principal's annual salary into twelve payments or less than twelve payments?

2. Where a regularly employed school principal has been granted a leave of absence for one month to teach at one of the state institutions of higher learning, and receives compensation therefor, may the county board pay the full officially adopted annual salary to the principal, regardless of the fact that the employee was paid for services by the institution of higher learning?

*To Mr. Clayton C. Bass, Superintendent of Public Instruction, Live Oak, Florida:*

Section 236.02, as amended by chapter 23726, Laws of Florida, 1947, sets up the conditions under which a county may participate in the foundation program fund. One of those conditions, appearing in sub-paragraph 3, contains the following:

"... and pay all instructional personnel whether employed on a ten or twelve months basis, over a period of twelve calendar months, except as otherwise authorized by the state board."

There are no state board regulations affecting that provision, and the answer to the question is that payment must be made on a twelve months' basis, and the number of payments may not be reduced in the discretion of the board.

It is stated that a principal was given a "professional leave of absence" for one month. A "professional leave of absence," under our statutes, means an absence granted for professional improvements of the teacher. Usually it involves further study. Teaching in another institution would not be classed as professional improvement, and a leave of absence to teach would not be a professional leave. Therefore, the leave of absence granted to said school principal was not actually a "professional leave of absence" but was a "personal leave of absence." No compensation may be paid to a teacher while he is enjoying a personal leave of absence. See section 231.43 of the statutes.

Assuming that it was in fact a personal and not a professional leave, and that the entire period of the leave of absence was time during which the principal was otherwise required to be in service, the board may not lawfully pay the principal's salary for such period. A teacher or principal who is employed on a ten months' basis may use his free two months as he sees fit, and if this principal taught in one of the institutions of higher learning during his free two months, it would not in any manner affect the annual salary payable to him under his contract with the county board.

### CHILD WELFARE; SCHOOLS

August 15, 1947.—047-263.

#### AGE OF ADMISSION—RULE FOR DETERMINING AGE

QUESTIONS: 1. In what respect does the law enacted by the 1947 Legislature, particularly sections 2 and 24 of chapter 23726, affect previous opinions regarding the age at which pupils may be admitted to the first grade of the public schools?

2. Where school opens in the month of September, is a child who will be six years of age on or before the following January 1 entitled to admission?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 228.16 referred to in the question sets up the several levels of public school education. Prior to the 1947 amendment, it provided that public education should be available to all persons from six to twenty-one years of age, inclusive; the 1947 amendment of that section provided that it should be available to all persons who have attained the age of five years and nine months on or before the first day of the calendar month in which schools open in any county. Consideration of that section is not necessary for an answer to the question, because it is not actually in conflict with the section of the statutes which specifically undertakes to prescribe the age of admission—section 232.01—and therefore, no further reference will be made to section 228.16.

Prior to the 1947 amendments, section 232.01 read in part as follows:

"... provided, further, that a child who has attained the age of five years and nine months on or before the opening day of school of any year shall be admitted at the beginning of the school term or at any time during the first month of the school year to the first grade of any public elementary school having only annual promotions, but if any child is not so enrolled in the first grade during the first month of the school year, he shall not be admitted to the first grade until the beginning of the following school year;



and provided, further, that any school having semi-annual promotions a pupil who has attained the age of five years and eleven months on or before the opening day of any semester shall be admitted at the beginning of the said semester or at any time during the first two weeks of the said semester."

In September, 1940, my predecessor, construing that section, held that a child who reached the age of five years and nine months at any time within the first calendar month after the opening day of school was entitled to admission. In other words, he was entitled to admission if on the opening day of school he was five years and eight months of age. The ruling was based upon the words, "at any time during the first month of the school year" and "any time during the first two weeks of said semester."

After pointing to the liberal interpretation of my predecessor, and considering the fact that the ruling had become established throughout the state over a period of five years and had remained unchanged notwithstanding three intervening sessions of the Legislature, in September, 1945, I concurred in and followed that liberal construction of the statutes; and I continued to follow it in two later opinions.

Section 24 of chapter 23726, Laws of Florida, 1947, amended section 232.01, and the pertinent part of the amended section reads as follows:

"... Provided, further, that any child who has attained the age of five years and nine months on or before the first day of the month within which schools open in any county during any year shall be admitted at the beginning of the school term or may be admitted at any time during the first month of the school year to the first grade of any school having annual promotions, but if any child is not so enrolled in the first grade during the first month of the school year except for illness as certified by a physician, he shall not be admitted to the first grade until the beginning of the following school year; and Provided, further, that a pupil who has attained the age of five years and eleven months on or before the opening day of any semester shall be admitted at the beginning of the said semester or may be admitted at any time during the first two weeks of the said semester to any school having semi-annual promotions."

It will be observed that the wording of the original act on which the liberal construction was based was repeated without change in the amendment. Under these circumstances, there would appear to be no justification for giving a different effect to those words of the statute at this time. Accordingly, it is my opinion that the only change as to age of admission to the first grade at the beginning of the school year, is that a child must be five years and eight months of age on the first day of the month in which school opens in his county, instead of five years and eight months of age on the opening day of school.

Most schools open in September. Any child is entitled to admission to the first grade of a school opening in September if he will be six years of age on or before the following January 1.

September 7, 1948.—048-289.

#### AGE OF ADMISSION—RULE FOR DETERMINING

**QUESTION:** Is a child who will reach the age of six years at any time in the month of December, 1948, entitled to admission to school which opened in this county on Friday, August 27?

*To Honorable D. M. Johnson, Attorney, Gadsden County Board of Public Instruction, Quincy, Florida:*

Practically all of the schools in the state open in the month of September and usually in the first week of September. Construing section 232.01,

as amended, I have heretofore held that children who reach the age of six years at any time during the month of December are entitled to enter if school opens on any day in the month of September.

The mere accident of opening school a few days before September 1 should not exclude these children. It is my opinion they are entitled to admission now.

February 20, 1947.—047-51.

#### ENROLLMENT OF STUDENTS—RESTRICTION BY AGE

**QUESTION:** May the Board of Public Instruction of Dade county, by rule, regulation, resolution or otherwise, limit enrollment of students in the first grade to those who will be six years of age on or before the opening day of school?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The question must be answered in the negative.

Section 232.01, Florida Statutes 1941, definitely fixes the age at which a child shall be admitted to the first grade in public schools of the state, and it is mandatory. The pertinent part of that section reads as follows:

"... provided, further that a child who has attained the age of five years and nine months on or before the opening day of school of any year shall be admitted at the beginning of the school term or at any time during the first month of the school year to the first grade of any public elementary school having only annual promotion, but if any child is not so enrolled in the first grade during the first month of the school year, he shall not be admitted to the first grade until the beginning of the following school year; and provided, further, that in any school having semi-annual promotions, a pupil who has attained the age of five years and eleven months on or before the opening day of any semester shall be admitted at the beginning of the said semester or at any time during the first two weeks of the said semester."

In the first interpretation of that section, my predecessor held that any child who reached the age of five years and nine months at any time within the first month following the opening of school was entitled to admission; for example, if the school should open on September 5, any child reaching the age of five years and nine months on or before October 5 was entitled to admission. In several opinions since that time I have concurred in that interpretation.

Under section 230.22 (1) and (2) a county school board is given authority to adopt policies, rules and regulations; but these may never conflict with the provisions of a statute governing the matter. Accordingly, any regulation, however it may be set up by the county board, would be invalid if it placed restrictions on admission greater than those required by the statute. This opinion assumes that there is no local or population act applicable to Dade county as to age of admission of children to the first grade.

#### COURSES OF STUDY AND INSTRUCTIONAL AIDS

August 21, 1948.—048-284.

#### TEXTBOOK PURCHASING BOARD—CANCELLATION OF CONTRACT

**QUESTIONS:** 1. Where the State Textbook Purchasing Board elects to cancel a textbook contract after the statutory three-year adoption term, but misdirects notice of cancellation and the publisher through no fault of his own fails to receive notice, would the contract continue to be

effective, or is the decision to cancel on the part of the board sufficient legally to abrogate the contract?

2. In the event the State Board exercises its option under section 233.17, Florida Statutes, 1941, to cancel a textbook contract in anticipation of a new adoption, but subsequently is unable to adopt suitable books as replacements, would it be lawful for the State Board, by agreement with the publisher, to continue the old contract in full force and effect?

*To Honorable Colin English, State Superintendent of Public Instruction:*  
Section 233.17 reads:

"The term of adoption for any book or books shall be three years, but this term shall be continued in effect thereafter until written notice is given before January tenth of any year by either party of decision to terminate the contract effective at the end of that school year."

Under the facts stated in the first question, and assuming that the publisher had no actual knowledge of the cancellation, the contract was not cancelled; it continues without interruption under the foregoing statute until such time as notice of the cancellation is legally given thereafter within the time provided in the statute.

As to the second question, attention is invited to section 233.16 (5) of the statutes. That subsection provides that, in case of failure of a publisher to furnish the books included in its contract, the board "shall make another contract on such terms as they may find desirable after giving due consideration to the recommendations of the state superintendent." In that statute the Legislature undertook to take care of the emergency by authorizing a contract without the usual statutory preliminary formalities. The situation in the second question is similar because there is need for the textbook and there is no time to make a new contract in the usual statutory manner. It is my opinion that the remedy set up in section 233.16 (5) would be applicable to the situation described in the second question, and the State Board may, upon recommendation of the state superintendent, make an agreement with the publisher to continue the old contract until the next time for adoption of textbooks.

June 23, 1948.—048-209.

#### BIBLE INSTRUCTION—NON-SECTARIAN

**QUESTION:** Are certain described plans for religious instruction, prevailing in Florida schools, stated to be currently in use and specified to be four in number, unlawful in Florida under the decision of the Supreme Court of the United States in the case of *People of the State of Illinois, ex rel, Vashti McCollum vs. Board of Education of School District No. 71, Champaign County, Illinois, et al.* 92 L. Ed. 451 (Advance Sheets)?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The specified plans submitted as currently in use are as follows:

Plan 1. In this plan some of the schools make it possible for ministers or religious workers representing the various denominations in the community to come in the school for one period a week to give religious instruction. The subject is elective.

Plan 2. In this plan various religious groups in the community combine to employ an individual full time to give religious instruction. The subject is given daily and is elective by the pupils.

Plan 3. This plan is similar to plan 1—the difference being that the outside instructors do not come to the school during regular school hours but after school has been dismissed. Children who wish this special instruction are invited to remain on their own time for the instruction.

Plan 4. This is the plan which is provided by the State Board of Education. For many years Bible has been listed as an elective subject in the secondary school program of studies. The interpretive comment made for this elective subject reads as follows:

"Where Bible instruction has been introduced into secondary programs, it has been regarded as an elective. The purposes of such an elective course would be to present necessary historical and literary background and to give general guidance in ethical values accepted by all our people. Emphasis would be given to general character development; no discussion of sectarian beliefs would be permitted. Such a course is administered most satisfactorily through the employment of a full time, regularly certificated, teacher of Bible, who is a member of the school faculty."

Before answering the inquiry as to the first three plans, three things are primarily involved. First; in the statement given of the several plans, can the United States Supreme Court decisions in the Champaign case, be said to be brought into operation in the plans presented? Second; should the attorney general undertake to apply hypothetical cases involving as important a subject as possible conflict between church and state in public school teaching? Third; are not these first three plans too moot to be opinionated about as to their legal status? Because of these three considerations I recommend that the first three plans be considered under the facts existing in the specific case, separately described.

In my opinion, the plan for Bible instruction in the public schools as described in the fourth enumerated plan, as provided by the State Board of Education of Florida, does not offend and is not made illegal by anything laid down as law by the Supreme Court of the United States in the aforesaid Champaign case. In the other three plans, described, to-wit: plans 1, 2 and 3, I do not find necessary conflict in the facts making up the plans as set forth, with the law declared in the majority opinion rendered in this Champaign case.

The subject presented is so important and of such far-reaching effect, not only in the administration of our public school system, but also in the recognition of the right to teach the Bible non-sectarianly, and the obligation to keep separate church and state, constitutionally, under the American system of government, that I feel a strong hesitancy in attempting to construe, interpret, or integrate in assembled form, the (omitted) facts that might, or actually do, make up either of plans 1, 2 and 3 and am, therefore, unwilling to assume anything, with respect to such facts, in order that the completed program involved in either may be considered.

If a specific case coming under plans 1, 2 and 3 is presented to me in full, with complete description, I shall be glad to give it my careful consideration, and pass upon its legality.

Summarizing the import of this letter, I hold plan 4, as submitted, to be legal and in nowise affected by the Champaign case.

I suggest, as to plans 1, 2 and 3, that these cannot be passed upon as submitted, and nothing shown as coming under these plans, appears to be in violation of law, nor contrary to the supreme court's holding in the said Champaign case.

## TRANSPORTATION OF SCHOOL CHILDREN

March 12, 1948.—048-89.

### SCHOOL BUSES—ATHLETIC ACTIVITIES—PERSONAL LIABILITY

QUESTIONS: 1. For what "school activities" may school buses be used other than for the transportation of students to and from school?



2. Are school football, basketball and other athletic games and 4-H club activities "school activities" within the meaning of section 234.03?

*To Mr. Thomas G. Hall, Attorney, Board of Public Instruction, Nassau County, First National Bank Building, Fernandina, Florida:*

A further question, if I correctly understand the letter, relates to individual liability of the members of the Board of Public Instruction. Attached to the request for opinion is a copy of a rider on one of the policies of insurance issued to your Board of Public Instruction and inquire as to the protection afforded to the board members under the provision of the policy when the buses are used for transporting students to and from athletic events, etc. I am sure you will understand after a moment's reflection that I cannot give you an opinion on questions pertaining to personal liability of board members.

The school buses may be used for the transportation of pupils to and from school and, when authorized by the board, to and from school activities which are under the auspices of the school board. In my opinion, school football games and other athletic events and 4-H Club activities are to be included in "school activities" when, as is customary, they are included in the school's extra-curricular program.

The insurance required by section 234.03 of the statute is for the benefit of the pupils and the insurance not required but permitted by that section is for the benefit of the public, generally, who may be injured by the negligent operation of the school buses. Such insurance is equally effective whether the injury results from the operation of the school bus while transporting children to and from school or from its operation in transporting pupils to school board-sponsored extra-curricular activities.

If I can give further help on these problems, I shall be glad to do so.

## SCHOOL PLANT

March 23, 1948.—048-102.

### LEASE OF UNUSED SCHOOL PROPERTY

QUESTION: Has the county board authority to lease for a term of years, and for a nominal consideration, improved school property not being used for school purposes, and which has not been used for school purposes for some years, to a community to be used as a community center?

*To Messrs. McClure and Turville, Attorneys for Board of Public Instruction, Pinellas County, St. Petersburg 5, Florida:*

What is said herein does not apply to any particular property, because I do not know the facts and circumstances, nor do I know the ultimate plans and purposes of the board in regard to the property to which the question relates. I can only give a general statement of the duties of the school board and the trustees in regard to the disposal and non-school use of school property.

Section 235.04 reads as follows:

"The county board may dispose, as it sees best, of any school land or property which has not been used for school purposes for one year or more and which is not likely to be used for school purposes and to credit the proceeds derived from the disposal of the property to the district or districts in which the school building is located. Upon request of the trustees, the county board may at any time arrange to dispose of unused school land or property and shall diligently attempt to do so on advantageous terms."

Section 235.02 authorizes the trustees to permit the use of school buildings and grounds within the district out of school hours or during

vacation for any legal assembly or as community play centers or for voting places in primaries and elections.

A school board is supposed to hold only such property as may be needed for school purposes and purposes closely related to the school program, or which it is believed may be needed for school purposes within the reasonably near future. If the county board has property, improved or unimproved, which is not needed or is not likely to be needed for school purposes, it should sell the same as authorized in section 235.04.

It is conceivable that there might be school property not presently needed but likely to be needed for school purposes later, and which it would be impossible to replace if sold. Under such circumstances it would be the duty of the school board to use good common business sense in determining whether or not to sell. If they then decide not to sell they could lawfully make a short term lease of such property to a suitable leasee and obtain as much revenue therefor as possible, consistent with the maintenance of the property and its future use for school purposes. If such presently unneeded property could not be profitably rented it would not be unlawful for the trustees to permit its occasional free use for such purposes as are set out in section 235.02.

School funds and school property are to be held and used exclusively for school purposes; it is not permissible for the school authorities to make contributions, whether of money or property or use of property, to non-school projects regardless of how worthy they may be except as may be authorized by section 235.02.

Summarizing—if the property is not now needed and not likely to be needed in the near future, it should be sold. If the board determines that it is likely to be needed for the schools in the near future; it is then their duty to obtain the best income possible for it, consistent with future use for school purposes. If it cannot be profitably rented, the trustees may lawfully permit its use under the circumstances and for the purposes set out in section 235.02.

September 5, 1947.—047-289.

#### MUNICIPAL BUILDING CODE— POWER TO REGULATE SCHOOL BUILDING

**QUESTION:** If the Board of Public Instruction of Dade County prepares plans and specifications for school buildings to be constructed within a city, submits same to the state superintendent of public instruction and obtains his approval as complying with the standards for school buildings set up in chapter 235 of the statutes, may the board construct such buildings without complying with the municipality's building code?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Stated in different words, you inquire whether municipal building codes are enforceable against school boards in the construction of school buildings within the city.

There is no Florida case on the subject. There are few cases elsewhere, and such as there are seem to be about equally divided in number. Those cases which hold that school boards are exempt from municipal building code regulations take the position that the state will not be presumed to have waived its right to regulate its own property by ceding to the city the right generally to pass ordinances of a police nature regulating such property within its boundaries, unless the statutes clearly indicate that such was the intention of the Legislature; and that in granting the city's charter and the right to adopt building code regulations, it is to be presumed that the Legislature did not intend to submit itself, or its agencies, to municipal regulations in that respect.

The cases which hold that school authorities must comply with municipal building code regulations do so on the ground that there is as much reason for compliance with such regulations by school, or other public authorities, as there is for private individuals; and the further ground that such building ordinances, presumed in law to be reasonable, and being necessary for the public safety, health and welfare, the state must be presumed to desire local regulations of its building construction, at least until it shall have adopted its own complete building code.

I think that the latter view, that is, that school authorities are required to comply with municipal building code regulations has the better of the argument, and that such is the law in this state. There are a number of considerations which lead to that conclusion. Some of them may be stated as follows:

The school code building standards appearing in sections 235.24 to 235.26, are repeatedly referred to in the statutes as minimum standards. They were designed for buildings to be constructed both in urban and in rural communities.

Except as to a minor item relating to heat and light, the statutory school building code is uniform throughout the state. Obviously, different areas of the State of Florida require different building code regulations as the same may be, and are, affected by soil, climate, temperature, and other atmospheric conditions. For example, there would necessarily be different building regulations in hurricane areas than in non-storm areas of the state; sandy soil areas might require one type of sanitary regulations, and clay soil areas, something else. This fact alone would strongly deny a legislative intention that such minimum standards were to be exclusive of all others.

Furthermore, the school building code regulations themselves show that they were not intended to be exclusive of municipal regulations. For example, section 235.26 (11) (a)—requires compliance with the requirements of "any other state or local official agencies" in the matter of wiring for artificial lights; section 235.26 (21) (a) requires compliance with "regulations of the governmental unit in which the building is located" in regard to fire escapes; and section 235.26 (22) includes the requirement for compliance with "the most recent regulations of local building codes" in respect to moving picture booths.

Section 235.27 specifically states that the approval of the state superintendent of public instruction shall not include responsibility for structural design or for the strength of materials proposed to be used, or for the mechanical design and efficiency of any heating, plumbing, ventilating or electrical system.

Reference to the school building code discloses complete absence of numerous customary building code provisions of greatest importance. For example, there are no regulations whatever on wall construction, thickness of walls, curtain walls, parapet walls, fire walls, thickness of bearing walls, footing and foundations, concrete composition, bearing capacity of soil, piling foundations, re-enforced concrete construction, types of tests which may be made, cement standards, concrete aggregate, metal re-enforcement of concrete, allowable unit stresses in re-enforcement, loads, wind pressure, unit stresses, mortar composition, brick composition, size and types of beams and columns, building materials. These are only a few of the important building code subjects which are not even mentioned in the statutory school building standards.

The fact that those building standards for schools were enacted by the Legislature would not make them exclusive. In *Egan vs. City of Miami*, 178 So. 132, the Supreme Court of Florida held that the City of Miami might lawfully adopt and enforce sanitary regulations in regard to tourist camps, notwithstanding the fact that both the State Board of Health and the State Hotel Commission had adopted regulations for such places.

Undoubtedly, the reason why the question has not been before the courts more frequently is this: If a municipal building code regulation is reasonable, public authorities, such as school boards, should unhesitatingly, promptly, and willingly, comply; if a municipal building code regulation is unreasonable, it may be attacked on that ground and be declared invalid, not only as to public agencies, but as to private persons as well. In fact, that seems to be what was done in *State vs. DuBose*, 128 So. 4. In that case the City of Vero Beach, by a zoning ordinance, prohibited the construction of a jail on county premises in an undeveloped part of the city. No question was raised as to the city's right to require county compliance; the ordinance was attacked on the ground that it was unreasonable, and the court held it unreasonable.

It is my opinion that the minimum standards set up in the school code were never intended to be exclusive; that they merely set up a minimum less than which is never permissible; and that while such statutory minimum standards must be complied with in all cases, they do not exempt school boards from compliance with additional and reasonable municipal building code regulations which are designed for the safety, health and welfare of the occupants of the buildings, as well as the public generally in that particular community. The question is answered in the negative.

April 9, 1947.—047-104.

#### LIGHTING—MINIMUM REQUIREMENTS

**QUESTION:** Has the State Board of Education authority to increase the minimum requirements for school lighting set up in section 235.26 (10) (11), Florida statutes, 1941?

*To Mr. W. J. Gardiner, Florida Counsel for the Blind, Daytona Beach, Florida:*

The cited section requires illumination on each desk of not less than ten foot candles. It is my opinion that under sections 235.24, 235.25 and 235.26 the State Board of Education has ample authority to increase the statutory minimum amount of school lighting by rules and regulations.

#### FINANCIAL ACCOUNTS AND EXPENDITURES

June 18, 1948.—048-205.

##### PURCHASE OF SUPPLIES—BOARD MEMBER—STOCKHOLDER

**QUESTION:** Where all of the school buses are ford buses, is it lawful for a County Board of Public Instruction to purchase materials, supplies and labor for repairing the buses from a corporation in Clewiston, Florida, in which one of the school board members is a stockholder and which company is the only ford dealer in that section of the county?

*To Dr. C. E. Weaver, Superintendent of Public Instruction, LaBelle, Florida:*

Even if there were no statutes prohibiting such a purchase, it would be contrary to public policy. But there are several statutes prohibiting such transactions. Section 230.23 (12) (1), Statutes of 1941, requires the county board to contract for materials, supplies, etc., for the county school system and contains the following proviso:

"Provided, that no contract for supplying these needs shall be made with any member of the county board, with the superintendent, or with any trustee in the county, or with any business organization in which any county board member, the county superintendent, or any trustee has any financial interest whatso-



ever, except that any trustee may submit sealed competitive bids and be awarded a contract as provided by law for the lowest and best bid."

Section 237.23 (1) makes such a contract void, and subparagraph (2) makes any board member who votes to pay an illegal charge against school funds and any county school superintendent who signs a warrant for such unlawful payment personally liable for the amount and subject to removal.

Purchase by any state or county or municipal board of supplies or materials for public use from a corporation in which any member of such board is interested, or paying for such purchase, is made a criminal offense by section 839.09. See also sections 839.08 and 839.10.

The question requires a negative answer.

January 7, 1947.—047-10.

#### CASH RESERVE—USE FOR SALARIES

**QUESTION:** Where the budget of a County Board of Public Instruction, approved in October, 1946, contains an item "reserve for cash balance to be carried over" may the board spend such fund thus reserved during the school year of 1946-47 for teachers' salaries rather than carry it forward into the next school year of 1947-48 as budgeted?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Certain transfers of school funds may be made under the circumstances and in the manner set out in the statutes but the budgeted item of "reserve for cash balance to be carried over" is not one of them. The Legislature has specifically prohibited the use of that reserve fund in the current year. Section 237.10 (2) concludes as follows:

"No part of any reserve adopted by the county board and included in the budget as a reserve for 'cash balance to be carried over' shall be spent during the year in which it is budgeted, but if received shall be carried over to provide funds for the early months of the succeeding school year before revenues for the year are actually available."

The foregoing statute is mandatory and will require a negative answer to the question.

I recognize the great difficulties of most of the teachers who are now trying to stretch inadequate compensation to meet the increased living costs. I shall be glad to prepare legislation for submission early in the 1947 session authorizing the transfer of these balances, or other school funds not immediately needed, so as to make them available for immediate adjustment of teacher compensation. I make the further suggestion to the teachers, that they confer with their representatives and enlist their aid in obtaining early passage of some such relief legislation.

May 28, 1947.—047-157.

#### TEACHER SALARY FUND—BALANCES—DISPOSITION

**QUESTION:** 1. In view of the repeal of sections 236.11 and 236.12 of the statutes by chapter 23726, Laws of Florida, 1947, the effect of which is to abolish the state teachers' salary fund, what disposition should be made of balances in the state teachers' salary fund credited to the several counties and held by the state treasurer as ex officio treasurer of that fund?

*To Honorable J. Edwin Larson, State Treasurer:*

Section 236.11 of the statutes makes the state treasurer ex officio treasurer of the state teachers' salary fund. There are balances to the

credit of the several counties now held by the ex officio treasurer of the fund.

The only manner provided by statute for the disbursement of the state teachers' salary fund is by warrant drawn by the respective county boards of public instruction on the state treasurer as ex officio treasurer of the fund. (Sections 236.12 and 236.13.) The state teachers' salary fund is a part of the county general school fund.

Chapter 23726 which abolishes the state teachers' salary fund takes effect on July 1, 1947. All balances now held by the state treasurer as ex officio treasurer of the state teachers' salary fund should be withdrawn by the several county boards and deposited in the county general school fund to be budgeted and used only for the purposes authorized by sections 236.12 and 236.13. The form of warrants prescribed by section 236.11 should be used for such withdrawal.

I suggest that each county board be immediately notified to draw and present warrants covering their respective balances some time prior to July 1, 1947.

December 9, 1947.—047-394.

#### TEACHER SALARIES—BACK PAY—JULY AND AUGUST SALARIES

QUESTIONS: 1. Under the school laws adopted at the last session of the Legislature, can the teachers of Dade county be paid any remuneration for the months of July and August prior to the time they reported for work on September 1, 1947?

2. Can the Board of Public Instruction issue warrants payable in the months of July and August, 1948, after the employee has completed his contract, prior to June 30, 1948, so that these warrants can be a part of the 1947-48 school budget? If so, when?

3. If school warrants for July and August, 1948, can be released prior to June 30, 1948, will the teaching personnel of Dade county be eligible to receive any remuneration for the months of July and August before they report for duty and assignment September 1, 1948?

*To Honorable Colin English, State Superintendent of Public Instruction:*

In answering the questions I assume there are no local, special, or population acts bearing on the questions, and what is said herein applies to all counties. I presume the questions refer to teachers employed on a ten months' basis. I also assume that the teachers had contracts, or were entitled to contracts, at the beginning of the school fiscal year. Obviously, the questions and answers relate to payment of salaries of teachers in only those schools conducted during the usual school months, September to June, and who are not on actual duty in the months of July and August.

Section 27 of chapter 23726, Laws of Florida, 1947, amended section 236.02 of the statutes, and subparagraph 3 thereof now requires:

"... twelve calendar months of service for such principals and other special instructional personnel as prescribed by regulations of the State Board, and ten calendar months of service for all other members of the instructional staff, any such service on a twelve months basis to include reasonable allowance for vacation or further study as prescribed by the county board in accordance with regulations of the State Board; and pay all instructional personnel whether employed on a ten or twelve months basis, over a period of twelve calendar months except as otherwise authorized by the State Board."

The question may be briefly stated thus: Were the teachers who had contracts to teach during the 1947-48 school year entitled to one of the twelve monthly salary instalments, for each of the months of July and

August, 1947? In other words, do the twelve months in which the teachers are to be paid for their ten months of service during any school year include the months of July and August at the beginning of the school year?

The school fiscal year begins on July 1 and ends on the following June 30; the school year is the period during which the schools are regularly in session within the school fiscal year. (Section 227.13 (24) (25).)

I have made careful study of the question, including a consideration of other sections of the 1947 school law amendments.

The provision in the aforementioned statute for payments over a period of twelve months for ten months of actual service was intended to provide funds for teachers during the summer, or vacation months, of July and August, and was solely for the benefit of the teachers. It is not reasonable to assume that with that purpose in mind, the Legislature intended the teachers to be without that relief in the first vacation period to follow, and which, in fact, was to begin a few weeks after the school bill was passed. Nowhere in the whole act is there any indication that the Legislature intended to postpone that relief for a whole year.

The foundation program includes a very large proportion of the funds for teachers' salaries. It will be observed that the 1947 amendment of section 236.09 providing for allotment to the counties of the foundation program funds, including funds for teachers' salaries, requires that: "This monthly apportionment shall be credited to and made payable for county general school funds of the respective counties beginning on the fifteenth day of July and continuing on the fifteenth day of each month thereafter to and including the month of June of each year." There can be no doubt that the foregoing provision required the teachers' salary fund allotment to be sent down to the counties on the 15th of July and on the 15th of August, 1947, and for the current school year.

It seems to me that these, and other considerations greatly outweigh arguments which may be made to the contrary. It is my opinion that the teachers were, and are, entitled to payment of one-twelfth of their annual salary in the month of July and a like sum in the month of August, 1947, and will be entitled to payment in those months at the beginning of each school fiscal year thereafter; and further, insofar as salaries for those two months in 1947 may not have been paid, they are now payable.

Any danger there may be in making payments for July and August in advance of actual teaching service, as well as other exceptional contingencies, can be guarded against by appropriate regulations which the foregoing statute authorizes the state board to make.

I believe the foregoing answer to the first question makes it unnecessary to answer the others.

October 10, 1947.—047-330.

#### TEACHER SALARY—VACATION ALLOWANCE—ABSENCE WITHOUT LEAVE

**QUESTION:** The principal of one of the senior high schools was put on a twelve months' salary basis for the year 1947-48. He attended summer school during the month of July 1947 but had not been given a professional or any other leave of absence. He reported for work on August 1 and has been paid for the month of August. He will be paid through June 1948. It is proposed to deduct salary for one month, or one-twelfth, from his annual salary. Is he entitled to a two weeks' vacation with pay during the 1947-48 school year, and may this be given for two weeks in July 1947?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 236.02, as amended by chapter 23726, Laws of 1947, in subparagraph 3, referring to employees on a twelve months' basis, requires:

"... any such service on a twelve months' basis to include reasonable allowance for vacation or further study as prescribed by the county board in accordance with regulations of the State Board."

On July 3, 1947, the State Board of Education adopted a regulation reading:

"County boards may schedule vacation time totaling not more than two weeks exclusive of school holidays for members of the instructional or professional administrative staff when school is not in session."

Under the aforementioned statute and state board regulation, it is the duty of the county board to make provision for annual vacation of two weeks to all employees on twelve months' basis, the vacation to be allowed during that part of the year when school is not in session. If, as stated in the question, this teacher was absent without leave during the month of July, he would not be entitled to salary for the month of July, but he would be entitled to two weeks' vacation and he may be given credit for two weeks' vacation with pay in the month of July of this year.

May 2, 1947.—047-120.

#### INVESTMENT OF SURPLUS—BOARD RESOLUTION

**QUESTION:** May the State Teachers' Salary Fund standing to the credit of Madison county and transferred to the transportation portion of credits due said county by chapter 22378, Laws of 1943, be legally invested in school district bonds of Madison county?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Chapter 22378, Laws of Florida, 1943, authorized the transfer of State Teachers' Salary Fund then standing to the credit of Madison county to the transportation portion of credits due that county upon approval by the State Board of Education. On September 7, 1943, the State Board of Education authorized and approved the transfer.

The State Teachers' Salary Fund, when apportioned to the credit of any county, becomes a part of the county general school fund of that county, and is required to be budgeted by the county board. (Section 236.13.)

There is no statutory provision for investment of any surplus or unneeded funds in the county general school fund. Section 236.49 authorizes the investment of proceeds of sale of bonds in various types of securities, including district bonds of the county, when, due to strikes, embargoes, war or similar occurrences, the money can not be immediately used. Section 236.54 authorizes investment of funds collected for retirement of school bonds in securities issued or guaranteed by the United States. Section 236.55 authorizes investment of interest and sinking funds collected for retirement of bonds in various types of securities, including school district bonds of the county.

Section 237.13, in providing for state board regulations in the matter of county school budget, includes a provision for state board regulation authorizing county boards to provide in their budget for school building and bus reserve funds, and to invest such funds.

Considering all of these statutes, the legislative intent would seem to be authorization of investment of specific school funds in certain securities named in the several statutes, and to permit investment of other surplus school funds under rules and regulations of the State Board of Education.

It is my opinion that the funds described may be lawfully invested in the securities mentioned in the question if and when the state board adopts a regulation applicable to all county school boards, authorizing the invest-



ment of surplus county general school funds. Any such regulation should restrict the investment to designated kinds of securities and to such as will mature or be readily converted into cash at or before the time when the money will be needed.

### RETIREMENT SYSTEM FOR TEACHERS

April 26, 1948.—048-147.

#### RETURN TO TEACHING SERVICE—REPAYMENT OF CONTRIBUTIONS

QUESTION: "Under the provisions of section 238.07 (8), does a teacher with credit for not less than ten years of service have the privilege of repaying his withdrawn contributions when he returns to service if he withdraws his money after July 1, 1945?"

*To Mr. K. D. Farris, Auditor, Teachers Retirement System, City Building, Tallahassee, Florida:*

The statute involved, section 238.07 (8) reads as follows:

"Any member who has taught, or who teaches in the public free schools of Florida for not less than an aggregate of ten years and withdraws or has withdrawn from the system, may elect to leave his accumulated contributions in the system or to repay his withdrawn accumulations to the system, and upon reaching retirement age he shall receive a retirement allowance based on the number of years of service which he taught in the public schools of Florida before retirement."

The foregoing sub-paragraph 8 of section 238.07 first appeared as 238.07 (6) Cum. Supp., having been enacted as part of chapter 22693, Laws of Florida, 1945.

It is stated that some doubt has arisen as to whether the words "withdraws or has withdrawn from the system" means withdrawal of contributions or discontinuance of teaching, and also whether the act applies to those who may withdraw their contributions after July 1, 1945, as well as to those who withdrew their contributions prior to that date. July 1, 1945, is the date the quoted sub-paragraph became law as part of chapter 22693, Laws of Florida, 1945.

The words "withdraws or has withdrawn from the system" refers to discontinuing teaching, and the quoted paragraph authorizes the repayment of contributions by anyone having the required number of years of service in the public schools of the state, regardless of whether he discontinued teaching or withdrew his contributions before or after July 1, 1945. The retirement allowance in such cases is to be based on the number of years of service in the Florida public schools.

March 13, 1948.—048-96.

#### TEACHERS' RETIREMENT SYSTEM—PRESIDENT, UNIVERSITY OF FLORIDA

QUESTION: Both the teachers' retirement system and the state officers and employees' retirement act have compulsory features. Of which of the two named retirement systems are the president and vice-president of the University of Florida required to become members?

*To Honorable C. M. Gay, State Comptroller:*

Section 238.01 (4), a part of the teachers' retirement system, defines "teacher." The section was amended by chapter 23864, Laws of Florida, 1947, and the relevant part now reads:

"'Teacher' shall mean . . . any member of the teaching or professional staff of . . . any tax supported institution of higher learning of the State of Florida . . ."

Regardless of whether or not the president and vice-president of the university are members of the teaching staff, they are undoubtedly members of the professional staff of the institution as that term is understood in the field of education, and that is the meaning to be given to those words in the quoted statute.

Section 238.05 (1) (b) reads as follows:

"All persons who are teachers on or after the first day of July, 1939, except as provided in subsection (a) hereof, shall become members of the retirement system by virtue of their appointment as teachers; provided, that employees who are not members of the teaching or professional staff shall only become members of the retirement system by filing a notice with the board of trustees of their election to become members."

Under the last quoted section appointees to the teaching or professional staff, within the meaning of section 238.01 (4), are required to become members of the teachers' retirement system upon their appointment.

These statutes lead to the conclusion that the president and vice-president of the University of Florida, both of whom were appointed during the current school year, were required to, and did, become members of the teachers' retirement system upon their appointment.

October 14, 1947.—047-406.

#### CONTINUED CONTRIBUTIONS—MEMBERSHIP AGE 62

QUESTIONS: 1. In view of section 238.09 (1) (b), may a member of the retirement system elect to make no further contributions to his annuity savings account at any age beyond age 60 or must he continue to make contributions if he fails to request to be a noncontributing member at age 60?

2. May a teacher who became a member at age 62 and elected to make no contributions, be retired under the provisions of section 238.07 (6) (b & c) acts of 1947, without contributing to his annuity account?

*To The Teachers' Retirement System, Mr. K. D. Farris, Auditor:*

Section 238.09 (1) (b) concludes as follows:

"But the employer shall not make any deduction for annuity purposes from the compensation of a member who has attained the age of sixty years, if such member elects not to contribute."

It is my opinion that a member who reaches the age of sixty years has a continuing option either to make contributions or discontinue contributions, and that he may not be required to continue contributions if he should fail to request change to the status of a noncontributing member promptly after reaching sixty. His contributing or failure to contribute after the age of sixty would affect only the annuity part of his retirement allowance; the pension part would not be affected one way or the other.

The 1947 amendment of section 238.07, sub-paragraph (2) (c), gives a member the privilege of retiring with the benefits provided by section 238.07 (6) (b & c), even though at his entering age of over sixty, the law requires him to make no contributions and he makes none. If he chooses not to make contributions, as he may do, he would not be entitled to the annuity part of the allowance authorized in section 238.07 (6) (a). The second question is answered in the affirmative.

July 19, 1947.—047-210.

#### OVER-AGE APPLICANT—ABILITY TO SERVE

QUESTIONS: 1. May the teachers' retirement system accept an application for membership from a county superintendent who is now more than seventy years of age and whose present term of office will expire in January, 1949?

2. If the preceding question is answered in the affirmative, will he be permitted to serve an additional term as county superintendent if elected in 1948, or will he be required to be retired on completion of his present term?

*To Mr. K. D. Farris, Auditor, Teachers' Retirement System, Tallahassee, Florida:*

Section 238.07 (1), Florida Statutes, 1941, provides that any member of the teachers' retirement system who attains the age of seventy years "shall be retired forthwith" except that "with the approval of his employer he may remain in service until the end of the school year following the date on which he attains seventy years of age."

In my opinion the statute requires a negative answer to the first question.

If the person to whom reference is made should be re-elected county superintendent in 1948 he may lawfully hold office, regardless of whether or not he might have membership in the teachers' retirement system.

October 14, 1947.—047-337.

#### CONVICTED CRIMINALS AS PENSIONERS—PENSION AS REWARD FOR SERVICE

QUESTION: On September 12, a principal of one of the schools was convicted of statutory rape committed on one of his students, a girl of fourteen years of age, a few weeks before the close of last school term. The principal was relieved of his duties immediately after the crime was committed. He has applied for disability retirement under the teachers' retirement system. If the medical board before which his application is now pending should determine that his physical or mental condition is such as would otherwise entitle him to a disability retirement allowance, would he be eligible for such disability retirement benefits under the foregoing circumstances?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Some, but not all, retirement acts contain a specific condition that the benefits of the act may not be enjoyed by any member who is guilty of certain type of misconduct, malfeasance, misfeasance, etc., and such provisions have been upheld by the courts. There is no such specific condition in the Florida teachers' retirement act.

Even under retirement acts which, like ours, contain no specific cancellation of benefits under those circumstances, the great weight of authority is to the effect that the member guilty of such serious misconduct is not entitled to retirement benefits.

The Florida teachers' retirement allowance is made up of an annuity consisting of contributions made by the member, and pensions added by the state. A pension is a reward given by the people for long and faithful service.

It seems to me that to bestow a reward upon a public servant who has committed such a reprehensible act would violate fundamental public

policy; and I am convinced that the Legislature did not intend to grant a pension to any public servant who commits such a crime. It is my opinion that in our statute there is an implied condition of continuing good behavior and such conduct as would be consistent with a gratuity from the state.

The California court, considering a similar question, said:

"The right to a pension is not indefeasible, and an employee, though otherwise entitled thereto, may not be guilty of misconduct in his position and maintain his rights notwithstanding such dereliction of duty."

Section 238.07, as amended by chapter 23726, Laws of Florida, 1947, in subparagraph 12 provides that:

"Should a member cease to be a teacher except by death or by retirement under the provisions of this chapter, he shall be paid such part of the amount of his accumulated contributions as he shall demand."

The principal is entitled to his accumulated contributions to the retirement system, upon his demand. His conduct has excluded him from all other benefits of the teachers' retirement act.

December 3, 1948.—048-350.

#### MEMBER RETIREMENT SYSTEM—EMPLOYEE NATIONAL YOUTH ADMINISTRATION

**QUESTION:** May credit be allowed a member of the teachers' retirement system for service rendered as an employee of the National Youth Administration?

*To Teachers' Retirement System, Tallahassee, Florida:*

The work of the National Youth Administration is not a part of the public school system of the State of Florida. The employees of the National Youth Administration as such are not compensated from Florida school funds. Section 238.01 (4) Florida Statutes, 1941, defines "teacher" for purposes of the teachers' retirement system. Such employee of the National Youth Administration is not a teacher within the meaning of that section.

The question requires a negative answer.

December 3, 1948.—048-352.

#### MINIMUM SERVICE TO ACQUIRE MEMBERSHIP

**QUESTION:** Does the Board of Trustees of the Teachers' Retirement System have the legal right to require a teacher to render not less than one year, of service as a member of the teachers' retirement system in order to be eligible for retirement?

*To Teachers' Retirement System, Tallahassee, Florida:*

It is explained in request for opinion that lately certain persons who taught in the schools of the state prior to the establishment of the teachers' retirement system on July 1, 1939, but who before that date went to other states to teach, or discontinued teaching, conceived the idea that they could come into Florida and teach for a month or two, then resign, and use that month or two of teaching as a basis for claiming years of prior service credit in Florida when they should reach the age of retirement. To prevent such abuse of the teachers' retirement system, the Board of Trus-



tees adopted a resolution requiring teachers to serve at least one year in order to qualify as members.

Section 238.05 (4), Florida Statutes, 1941, reads as follows:

"The board of trustees may in its discretion deny the right to become members to any class of teachers who are serving on a temporary or any other than a per annum basis, and it may also in its discretion make optional with members in any such class their individual entrance into membership."

It is my opinion that under the quoted section of the teachers' retirement system the trustees have the power and authority to adopt such a regulation as that described in the question.

December 1, 1948.—048-349.

#### TEACHER RESIGNS—REINSTATEMENT OF MEMBERSHIP

**QUESTION:** Where a teacher with twenty-one years of service credit resigned two years and one month prior to July 1, 1945, but did not withdraw his contributions, did he lose his membership by continuous unemployment for more than two years, or is he entitled to retain membership by reason of having taught more than ten years?

*To Teachers' Retirement System, Tallahassee, Florida:*

In this case the teacher resigned on April 30, 1943. A few years prior to this, he had been retired on disability. Although he recovered sufficiently to resume teaching, he has never completely recovered his health. He has approximately twenty-one years of service as a teacher. In the school year 1942-1943 he had taught one month in another county prior to the opening of school, thus actually having given a full year's service—nine months—as a teacher during that school year.

It is quite evident that he did not intend to discontinue teaching when he resigned on April 30, 1943, because at that time there was no reason whatever for him to leave his contributions in the retirement system if he did not intend to teach again.

Section 128.05 (3) provides that membership shall cease if a teacher is continuously unemployed as a teacher for a period of more than two years. Section 238.07, Florida Statutes, 1941, was amended by chapter 22693, Laws of Florida, 1945, by adding among other things, a new provision to the effect that any member who has taught in the public schools of Florida for not less than an aggregate of ten years may elect to leave his contributions in the system, or repay them if he has withdrawn them, and receive retirement allowance when he reaches the age of retirement. That amendment now appears under the 1947 amendment of the same section, as 238.07 (8).

The 1945 amendment became effective on July 1, 1945. It will be observed that this member actually resigned two years and one month prior to the effective date of the 1945 amendment of section 238.07. However, he had actually served a full nine months in the 1942-1943 school year, and for that reason and the other facts and circumstances peculiar to this case, reasonable construction of the intent of the Legislature in the 1945 amendment of section 238.07 will require holding that this man had not been continuously unemployed as a teacher for more than two years from the effective date of the 1945 amendment, and that amendment gave him the right to leave his contribution in the system and retire when he reaches retirement age.

It is my opinion that the person under consideration is entitled to be reinstated.

**BOARD OF CONTROL**

September 2, 1948.—048-295.

**LIABILITY FOR TORT—LIABILITY INSURANCE—VISITOR  
RINGLING MUSEUM**

**QUESTIONS:** 1. The Board of Control, in operating the Ringling Museum of Art and the Ringling Home, charges admission to visitors. Would this make the board liable for injuries which paying visitors might receive on the premises?

2. May the Board of Control take out an insurance policy to protect itself against such claims?

*To Board of Control, Florida State University:*

The fact that the Board of Control charges admission to visitors at the institutions named in the question would not affect its immunity from suit for tort. The board would not be liable.

In view of the fact that the board holds immunity from claims arising in tort, it would not be lawful to expend public funds for insurance to protect against such claims. It would require an act of the Legislature to authorize the expenditure of the board's funds for such purposes.

September 3, 1948.—048-296.

**LIABILITY FOR TORT—PERSONAL INJURY**

**QUESTION:** A woman was injured while attending school exercises on the grounds of the Florida School for the Deaf and Blind. She requests reimbursement for hospital and medical expenses resulting from the injury. Is the Board of Control liable?

*To Board of Control, Florida State University:*

The Supreme Court of Florida has followed the universal rule that the state is not liable for tort. The Board of Control, as a state agency, is not liable for the damages claimed by this woman.

September 3, 1948.—048-294.

**LIABILITY FOR TORT—DAMAGE TO PERSONAL PROPERTY**

**QUESTION:** Is the Board of Control liable to a member of the faculty of the University of Florida, owner of an automobile, for damages to the car caused by the falling of a tree when the car was parked in a regular parking area on the university campus?

*To Board of Control, Florida State University:*

A state agency is not liable for tort. (Arundel Corporation v. Griffin, 103 So. 422, and State Road Department of Florida v. Tharp, 1 So. (2) 868.)

The Board of Control is an agency of the state, and, therefore, not liable for the injury to the automobile caused by the falling tree.

September 3, 1948.—048-293.

**CONDEMNATION PROCEDURE—EXPANSION—UNIVERSITY OF  
FLORIDA**

**QUESTION:** The Board of Control desires to acquire a house and lot for the University of Florida within the area of its present expansion

but is unable to reach an agreement with the owners as to price. What steps would be necessary to acquire the property under condemnation proceedings?

*To Board of Control, Florida State University:*

Section 240.13 authorizes the Board of Control to exercise the right of eminent domain whenever it becomes necessary for the welfare or convenience of the institutions of higher learning to acquire private property for the use of such institutions, if same cannot be acquired by agreement satisfactory to the board and the owners. The customary procedure for condemnation may be found under chapter 73, Florida Statutes, 1941. Section 240.14 requires the attorney general to conduct the condemnation proceedings for the Board of Control.

August 2, 1948.—048-258.

#### UNIVERSITY HOUSING PROJECT—APPROPRIATIONS—REVENUE CERTIFICATE

QUESTIONS: 1. Under chapter 23915, Laws of Florida, 1947, the general appropriation act, appropriated for the University of Florida, in item 39-f, "special account co-education, salaries, \$100,000", and item 39-g, "special, account co-education, expense, \$250,000." It is now planned to use and apply \$50,000 from item 39-f and all of item 39-g, a total of \$300,000, toward the cost of the 1948 university housing project, consisting of new dormitories for 1,000 students and the remodeling of certain existing dormitories. May said \$300,000 be used for that purpose?

2. The 1948 university housing project consists of a plan to build six new dormitories and remodel three existing dormitories at the university, using therefor \$1,000,000 from appropriated funds and issuing revenue certificates of approximately \$3,000,000 to cover costs of the project. Would letting the contract for, and proceeding with, the construction of two of the new dormitory units included in the project prior to issuance of the proposed revenue certificates adversely affect the legality of the proposed issue of revenue certificates?

*To Board of Control, Florida State University:*

It is explained that the Board of Control, the Budget Commission and the Board of Education have all approved a \$4,000,000 self-liquidating dormitory project at the University of Florida. As now planned, the 1948 university housing project consists of new dormitories for 700 men and 300 women students and the remodeling and renovating of three present dormitories. The estimated cost is from \$3,800,000 to \$4,000,000. Money for the construction is to be provided by \$1,000,000 from funds appropriated by the 1947 Legislature and the remainder from proceeds of revenue certificates to be issued and sold in the amount of approximately \$3,000,000. The State Budget Commission has released the \$1,000,000 and use of the funds for building purposes at the university has been authorized.

It is explained further in the request for opinion, that to provide sufficient time to prepare, validate and sell the revenue certificate issue to support the 1948 university housing project, will mean that the urgently required dormitory facilities will not be available for the opening of the fall semester in September, 1939. In order not to delay the entire project pending the issuance of the revenue certificates, the Board of Control has approved a proposal that the \$1,000,000 immediately available for the construction of the 1948 university housing project be used at this time to erect the first two of the six self-liquidating dormitory units to be completed under that project and have them ready for occupancy in September, 1949.

The funds appropriated by chapter 23915, item 39-f, for salaries on the account of co-education may be used for expenses on the account of co-education. (See section 13 of chapter 23915.) It is my opinion that these funds appropriated for expenses on the account of co-education may be used for the construction of authorized building for co-educational needs when released for that purpose by the State Budget Commission. The first question is answered in the affirmative.

Letting contract for, or beginning work on, the construction of two of the six new dormitory units, or any other part of the entire 1948 housing projects, within appropriated funds presently available for the project, prior to issuance of revenue certificates from which funds for the remainder of the cost of the project are to be obtained, will not, in my opinion, adversely affect the legality of the proposed revenue certificates.

May 20, 1948.—048-176.

AUTHORITY OF BOARD—TRUST FUND—  
GIFT TO UNIVERSITY OF FLORIDA

**QUESTION:** Should the Board of Control execute form of release and waiver submitted by the trustees of the Louis Dudley Beaumont Trust Estate, and if so, what is the proper method of execution of the papers?

*To Board of Control, Florida State University:*

Submitted with the request for opinion is a printed statement of the trustees of the trust estate dated April 15, 1948, from which it appears that Mr. Beaumont died in October, 1942; that under the provisions of his trust agreement, the university was entitled to receive the sum of \$50,000.00 after his death and after all obligations of the estate, including taxes and all debts and certain preferred beneficiaries had been paid in full; that inheritance tax liability was not established until May, 1945; that thereupon, in July, 1945, the full amount of the gift, \$50,000.00 was paid to the university; and that the trust agreement made no provision whatever for payment of interest.

The trustees have submitted a form of release and waiver of notice for execution by the Board of Control. The release acknowledges receipt of the gift of \$50,000.00 in July, 1945, and contains an agreement by the board to accept interest on the principal amount of the gift at the rate of 3% per annum from April 15, 1943 (date of appointment of the trustees), to June 15, 1945. The instrument further releases and discharges the trustees from all claims and demands, etc., against the estate, waives notice of further proceedings in the estate, etc.

It appears that the deed of trust is a very lengthy document which was modified from time to time by numerous additional instruments. I have no copy, and understand that none are available for distribution. In view of the fact that the trust deed does not provide for interest on gifts to the beneficiaries, legal questions would be involved as to whether any interest is payable, and if so, from what date and at what rate. Obviously, I cannot give you a definite answer without examination of the trust instruments. In any event, court construction of the instruments would be required to determine such questions finally.

The proposal is, in effect, a suggestion of settlement and compromise of any such legal questions there may be as to interest. If any interest is actually payable, the rate would probably not be in excess of the rate of earnings of the trust estate and such earnings would not likely exceed 3%. The period of time over which interest is proposed to be paid begins at the appointment of the trustees, which was a few months after the death of the grantor.

It is my opinion that the Board of Control has the authority to accept the proposal and execute the release if, under all the circumstances,



it is the board's opinion that it is to the best interest of the university to accept the offer.

In the event the board decides to accept the proposal, I shall be glad to make some necessary changes for the execution of the papers and give such advice as may be needed as to manner of execution.

What is said herein applies with equal force to the same proposal made by these trustees in regard to the gift to the Florida State College for Women.

April 21, 1948.—048-132.

#### LAW GRADUATES—DIPLOMA PRIVILEGES—AUTHORITY

QUESTION: May the Board of Control recognize the work of an out-of-the-state law college so as to give the benefits of diploma privileges to graduates of such out-of-state law college?

*To Honorable J. Thos. Gurney, Chairman, Board of Control:*

I know of no legal authority in Florida in the Board of Control which relates to its giving benefits based upon diplomas to law students in the field of law.

April 6, 1948.—048-120.

#### LIABILITY INSURANCE—MOTOR VEHICLES— STUDENT'S RESPONSIBILITY

QUESTIONS: 1. May students owning and operating motor vehicles be required to carry full liability insurance?

2. May parents of students who are minors, who own and operate motor vehicles, be required to assume complete responsibility in all respects in connection with the operation of such motor vehicles?

*To Board of Control, Florida State University:*

The general rule is that university and college authorities may make all necessary and proper rules and regulations for the orderly management of their institutions and preservation of discipline therein, but it is also generally recognized that courts may and should intervene if rules and regulations are found to be unauthorized, against common right, or palpably unreasonable. Rules and regulations promulgated by public institutions of learning are more critically viewed by the courts than are those of private institutions. As is said in 14 C. J. S. 1360, "the governing board of a college or university . . . may place inhibitions and restrictions on matters materially interfering with the proper relation of students to the college or university . . ."

The answer to such questions seems to depend on whether the regulation is concerned with the proper relation of the student to the college, or is concerned with the activities of the student as a citizen in his relation to other citizens.

It does not appear to me that liability insurance on a motor vehicle operated by a student is a matter concerning the relationship of the student to the university and it is my opinion that it may not be required.

A parent is legally liable for injuries and damage caused by the negligent operation of a motor vehicle by his minor child. In addition to that general rule of law, section 322.09 (3), provides that:

"Any negligence or willful misconduct of a minor under the age of eighteen years when driving a motor vehicle upon a highway shall be imputed to the person or head of a family who has signed the application of such minor for a permit or license, which

person shall be jointly and severally liable with such minor for any damages caused by such negligence or willful misconduct."

There is also the motor vehicle financial responsibility law of the 1947 session of the Legislature, which under the circumstances set out in the act, requires liability insurance or other guarantees of responsibility. That act also is applicable to students in the state institutions of higher learning.

It is my opinion that the board would have no authority to require parents of minor students to assume any liability beyond that now provided by law.

December 31, 1947.—047-441.

#### ADDITIONAL BOND FOR MANAGER—FORM OF SECURITY BOND

QUESTIONS: 1. Will it be necessary for the business manager and acting secretary, as custodian of the funds received by the board of control from the John G. and Fannie F. Ruge Trust Estate, to furnish a bond in addition to the one which he now has with the National Surety Corporation? If the answer is in the affirmative, in what amount should the bond be furnished?

2. Should the bank in which these funds are deposited put up separate collateral securities for these bonds, or would the securities which are now deposited by these banks for other board of control funds be sufficient so long as enough security is deposited to cover 100% of all deposits of the board of control?

3. If a new bond is furnished by the business manager and acting secretary, and separate collateral deposited by the bank, will it be necessary for the bond and collateral to be kept by the chairman of the board personally, or would the keeping of these in the office of the board of control satisfy the provisions of the trust indenture?

*To Board of Control, Florida State University:*

Submitted with the request for opinion is the bond of National Surety Corporation, dated November 7, 1945, covering the business managers of the several state institutions of higher learning, as well as the present business manager and acting secretary, the latter in the amount of \$100,000.00 being covered by endorsement of July 31, 1947. The bond is payable to the Board of Control.

Section L of the Ruge Trust deed reads in part, as follows:

"L. The State Board of Control of the State of Florida shall require its Secretary, Auditor, and/or any other person or persons having custody of the funds paid over to said State Board of Control by the Trustees, pursuant to the terms hereof, or give to said State Board of Control of the State of Florida a bond for the faithful performance of his or her duties in such amount as will adequately cover the funds of which he has custody, with a surety company of national standing authorized to do business in the State of Florida as surety. The said State Board of Control of the State of Florida shall also require a similar bond or what under the law of Florida may be a satisfactory substitute therefor, from any bank or trust company in which any of said funds or the securities in which said funds are invested are deposited. The Chairman of said State Board of Control shall be the custodian of any such bonds."

Subsequent to submitting the foregoing questions, the said business manager and acting secretary inquired whether the bond should remain in his custody in view of the fact that it covers him as well as others.

Answering the first question, it is my opinion that one bond covering the business manager and acting secretary for all of his responsibilities, including the Ruge Trust funds, will be sufficient; but in response to the question raised by your secretary, mentioned above, I wish to point out that it is neither customary nor proper for a person covered by a bond to have custody of such bond, and in this case, therefore, it is my opinion that a separate bond should be made by the business manager and acting secretary.

Answering your second question, it is my opinion that it will not be necessary for the bank where the Ruge Trust funds may be deposited to deposit bond or separate collateral securities to secure the Ruge funds, provided that sufficient collateral is deposited to cover all Board of Control funds, including the Ruge Trust funds, and the deposit agreement is broad enough to cover the Ruge Trust funds, as well as other Board of Control monies.

The trust agreement requires the chairman of the Board of Control to be custodian of such bonds. This will include bond or collateral deposited by the bank. The method by which the chairman of the Board of Control performs his duty in that respect is largely a matter of his own judgment and discretion. He is responsible for their safety, and it is his personal duty to see that they are safely kept. Any means or manner which follows good sound business custom and practices in such matters will satisfy the trust provision so far as that is concerned. I express no opinion as to whether or not the amount of the bond for the business manager and acting secretary is adequate.

I notice another matter to which I wish to call attention. One of the terms of the bond provides that liability of the surety for the failure of any employee to account for and pay over shall be limited to the failure to account for and pay over funds actually in such employee's possession, etc. It is my understanding that Board of Control funds are disbursed by the joint signatures of the chairman and the secretary, and that in fact the chairman's signature is usually by rubber stamp. There is some doubt whether this method of handling funds, particularly the joint responsibility for disbursement, would come within the words "actually in such employee's possession." It seems to me that, strictly speaking, the funds are not in the possession of the secretary but in the joint possession of the secretary and chairman of the board. It is my opinion that this doubt should be cleared in the new bond to be made by the business manager and acting secretary, by appropriate recitals to cover the exact manner and method of handling and disbursing Board of Control funds by its secretary.

I am returning herewith the bond of November 7, 1945, as well as an insurance survey dated March 10, 1945.

December 15, 1947.—047-412.

#### CONTRACTS WITH VETERAN'S ADMINISTRATION—VOCATIONAL TRAINING CONTRACTS

QUESTION: By whom should contracts for vocational rehabilitation training be executed?

*To Board of Control, Florida State University:*

As I have pointed out in regard to a similar Veteran's Administration contract, these contracts should be executed by, and in the name of, the Board of Control, as contractor—not in the name of the institution. The particular institution of higher learning where the instruction is to be given should be named in the contract.

With those corrections, it is my opinion that the board may lawfully execute the supplement.

December 4, 1947.—047-395.

UNIVERSITY TRAFFIC CONTROL—POLICE AUTHORITY ON  
CAMPUS

QUESTIONS: 1. What legal authority, if any, is granted to the University of Florida to control and regulate traffic and parking on the campus? For example, does the University of Florida have authority to deny parking privileges to any individual and does it have the authority to reserve a particular parking area for the exclusive use of an individual?

2. If the authority to regulate and control traffic and parking on the campus does exist, what means may the University of Florida employ to enforce compliance with traffic and parking regulations? (Etc., etc.)

*To Mr. W. F. Powers, Business Manager and Acting Secretary, Board of Control:*

I have omitted stating the etc. part of question 2, because the answer to the first question makes same unnecessary.

The University of Florida has no legal authority to control and regulate traffic and parking on the campus, except, that it may, in regulating for conduct of its students, make university rules, providing for the students to use the roads and streets, through the campus, or make use of the campus to such an extent and in such manner, as in the judgment of the Board of Control—or the university authorities to whom such rule-making power is delegated by the Board of Control—is appropriate and proper for college decorum, order and behavior. This is not exercising any legal or police power and no penalties can be imposed in connection therewith, except those authorized by the board to be imposed for other violations of university conduct regulations. Police authority cannot be employed to enforce the regulations and rules herein referred to, but for violations thereof, those committing same can be summoned before university authorities for discipline.

Police authority on the campus of the University of Florida, where it is in the city limits of the City of Gainesville, is subject to police control of that city under its city charter and ordinances. The speed of automobiles upon the streets within the campus are subject to control under the same laws as are enforced upon the streets of the City of Gainesville. If the university authorities desire a different speed law within the campus than is within the city, the ordinary procedure for attempting to obtain same would be to request the passage of a law, or an ordinance, for automobiles, making provision therefor.

Roads and streets on that part of the campus outside the City of Gainesville are subject to police control by the sheriff of Alachua county—assuming the property to be within that county—and the officers of the road patrol, as are any other roads of the state in any other county.

If the university authorities find that the law set forth herein cannot be made applicable to its premises because of the lack of cooperation on the part of any official authorities, either state, county, or city, such should be made known to the governor for his executive and official action with respect thereto.

November 19, 1947.—047-381.

RELEASE OF CONSTRUCTION BOND—PREREQUISITES TO  
RELEASE OF BOND

QUESTION: Construction of a library at the Florida A. & M. College under Standard Form, 5th Edition, American Standard of Architects, has been completed except work which will amount to approximately \$5000.00 and which can not now be completed because materials therefor are un-



available. Beers Construction Company, the contractor, has requested release to it of "monies due from the retained percentage of 15% up to the amount of \$5000.00 on work yet to be done." The surety company which executed the bond of the contractor has written a letter to the Board of Control agreeing to this release of funds with the understanding that it will not in any way prejudice the bond as executed by the surety company for the Beers Construction Company on behalf of the Board of Control. Will the Board of Control lose any of the protection of the bond if it releases the money as requested?

*To Honorable J. Thomas Gurney, Chairman, Board of Control:*

The architect states that he and the Board of Control are willing to accept the work so far completed. I have considered the letter from the surety company, as well as the terms of the contract, and it is my opinion that the board would not endanger the protection of the bond if the retained 15%, except \$5000.00 thereof, should be released to the contractor under the circumstances in this case, provided the contractor complies with article 5 of the contract which requires that he shall submit evidence satisfactory to the board's architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

January 25, 1947.—047-33.

#### CONTRACT—USE OF BUSES

QUESTION: Does the law authorize a contract between Federal Public Housing Authority and the Board of Control for use of buses owned by the United States?

*To Dr. John J. Tigert, President, University of Florida, Gainesville, Florida:*

I have examined the contract submitted on January 23, and find nothing therein which violates the laws of the state. I wish to point out that it is not necessary that such contracts be signed by the State Board of Education. The Board of Control has ample authority under section 240.11 and 240.04 of the statutes to enter into such contracts without the approval of the State Board of Education.

In order to avoid delay in the completion of the contract, I am returning the same herewith, but it will be necessary that I have a copy for my file, which copy you may supply later.

January 24, 1947.—047-32.

#### RENT CONTROL—OPA POWERS—AUTHORITY

QUESTION: Where the Board of Control, for the purpose of providing housing facilities for faculty members, took over partly constructed housing units, obtained necessary priorities for their completion and provided the money necessary to finish the construction, are the rents fixed for occupancy of the housing units subject to OPA regulation?

*To Dr. John J. Tigert, President, University of Florida, Gainesville, Florida:*

Until recently there was doubt in many quarters as to whether the emergency price control act applied to states or political subdivisions thereof. The courts to whom the question was presented were not in complete agreement, but the question has very lately been definitely settled by the Supreme Court of the United States in the case of *Case v. Bowles*, 90 Law Ed. 398 (Advance Sheet). Construing the emergency price control act, the court said:

"We think it too plain to call for extended discussion, that Congress meant to include states and their political subdivisions when it expressly made the Act applicable to the United States 'or any other government, or any of its political subdivisions, or any agency of any of the foregoing . . .'. Congress clearly intended to control all commodity prices and all rents with certain specific exceptions which it declared. It would frustrate this purpose for courts to read exemptions into the Act which Congress did not see fit to put in the language. Excessive prices for rents or commodities charged by a state or its agencies would produce exactly the same conditions as would be produced were these prices charged by other persons."

On the same day the supreme court reversed the Supreme Court of Idaho which had reached the opposite conclusion on a similar question. Accordingly, the question is answered in the affirmative.

In spite of the foregoing, however, I wish to say this:

Now, since the president has declared an "end of hostilities" and no new emergency has been declared authoritatively and legally subsequent to the end of hostilities declaration that would seem to give the necessary background, I question whether the Supreme Court of the United States would hold that its decision in the Bowles case, supra, applies to the facts presented in request for opinion. There is grave doubt of there being any OPA power constitutionally existing or even statutorily conferred, now, that would authorize this agency's interference with state government administration of its public affairs in the field of rent controls.

February 25, 1947.—047-58.

#### GRANT OF LAND USE—FORM OF CONTRACT

QUESTION: In a War Department license covering use and occupancy of certain buildings at Dale Mabry Field by the Florida State College for Women, to whom should the grant be made?

*To Mr. J. T. Diamond, Secretary, Board of Control, Florida State College for Women:*

It will be noted in the third line of the license that the period of time is June 18, 1946, to June 30, 1946. Obviously, this is an error.

As written, the grant is to Florida State College for Women. The grant should be either to the "State Board of Education of Florida" or to the "Board of Control, a public corporation of the State of Florida." In this case it might be preferable to make the grant to the Board of Control. If made to the Board of Control, acceptance of the contract should also be by the Board of Control.

It is suggested that the following changes be made:

1. Correction in the third line to comply with the period of time actually intended.
2. In the second line substitute "Board of Control, a public corporation of the State of Florida" where now appear the words "Florida State College for Women."
3. The acceptance should be signed:

#### BOARD OF CONTROL

By.....  
Chairman

..... (Seal)  
Secretary

When such changes shall have been made, it is my opinion that the contract will be lawful in form and content.

February 24, 1947.—047-55.

#### POWER CONTRACT—EXPERIMENT STATION

**QUESTION:** Is the amendment of the contract between Florida Light & Power Company and the Board of Control for light and power at the Experiment Station at Belle Glade legal?

*To Dr. John J. Tigert, President, University of Florida, Gainesville, Florida:*

A proposed amendment has been submitted, dated January 29, 1947, to the Standard Large Power Agreement now in effect and dated May 20, 1936, as well as rate schedule GS-3. It seems that a member of the staff of the College of Engineering considers that amendment will result in a saving to the state.

Assuming that the amendment is not to the financial disadvantage of the Board of Control, I find nothing unlawful in the amendment, and it is approved as to form.

October 2, 1947.—047-324.

#### COMPULSORY VACCINATION—PREREQUISITES TO ADMISSION

**QUESTION:** Is the Board of Control authorized to refuse admission to the institutions of higher learning to students to refuse to comply with the board's published requirement that "all students are required to have been successfully vaccinated against smallpox within the past five years"?

*To Honorable J. Thos. Gurney, Chairman, Board of Control, Orlando, Florida:*

There are no Florida cases, but there are a great many in other states on the question of vaccination or a certificate of immunity as a condition for admission to the public schools. They very generally relate to the public schools of primary and secondary level. The authorities are not in accord and reach their different answers by several different routes.

The Board of Control has very broad powers. Section 240.04 gives the board jurisdiction and complete management and control of the institutions of higher learning with power to make all necessary rules and regulations for their government; section 241.03 authorizes the board to adopt requirements for admission; section 239.01, as amended by chapter 23669, Laws of Florida, 1947, also provides that the board shall prescribe the requirements for admission.

At least in regard to schools of primary and secondary level the statutes contemplate that regulations on health and sanitation be adopted jointly by the State Board of Education and the State Board of Health. (See sections 232.29 to 232.31, 232.34, 232.36 and 381.50.)

There is no statute in this state specifically authorizing a vaccination requirement. On the contrary, sections 230.23 (8) (f) and 230.33 (8) (f) provide that except in emergencies pupils may be given remedial or preventive treatment only on written consent of the parent."

In an earlier opinion I held that these statutes prohibit county boards of public instruction from compulsory immunization or vaccination against contagious or infectious diseases except in emergencies.

Even if the last mentioned statutes should not apply to institutions of higher learning, they nevertheless clearly show the legislative policy with reference to compulsory vaccination and inoculation. There appears to be no sufficient distinction between students of college level and students of a lower school level to warrant a rule for one different from the other in the matter of vaccination or inoculation against contagious and infectious

diseases. Furthermore, the weight of authority holds that in the absence of an authorizing statute, a vaccination requirement as a condition of admission is invalid except in cases of actual or threatened epidemic.

It is my opinion that the board may not lawfully refuse admission on failure of the student to comply with the vaccination requirement set out in the question, except in cases of epidemic or imminent danger of epidemic.

September 27, 1948.—048-314.

#### CONTRACTS EXTENDING BEYOND CURRENT APPROPRIATION BIENNIUM

QUESTION: May a state agency lawfully execute a contract to run beyond the current appropriation biennium when it involves payment of funds in a subsequent biennium which the agency does not have and will not have during the current biennium?

*To Board of Control, Florida State University:*

On several occasions heretofore, I have held that the Board of Control may not lawfully execute a written obligation to pay money beyond the current biennium except from funds presently available; in other words, that the board may not bind a subsequent Legislature to appropriate funds to satisfy a contract which the board might make in the current biennium. Consideration of the incidental fund did not solve the difficulty because it is, in fact, a biennial appropriation and would be governed by the same rules as other moneys appropriated for the board by the Legislature.

The Supreme Court of Florida has held that written obligations to pay money in the future are bonds, and, therefore, may not be issued by a state agency.

Another reason why it is unlawful to promise to pay money not available in the current biennium, at a time or times in a subsequent biennium, is a provision in the appropriation act which reads as follows:

"No official, commission, board, department or other agency of the State Government shall contract to spend or enter into any agreement to spend any monies in excess of the amount appropriated herein and any contract or agreement in violation of this provision shall be null and void."

While there appears to be no reason to change my earlier opinions on this question, I think it is possible to prepare a lawful contract extending beyond the present biennium and for such purpose as the board has indicated, provided there is inserted in the contract a provision such as the following:

"The Board of Control is a state agency, and its obligation herein to use electrical energy of the party of the first part in any amount or to pay for same, in any succeeding biennium, is conditioned upon the Board of Control then having funds lawfully available for the payment thereof."

The effect of this provision is to relieve the board from any obligation whatsoever for the payment of money at any time beyond the current biennium unless the board then has money lawfully available for that purpose; it eliminates the objectionable absolute promise to pay in the future. A contract containing such a provision does not violate the quoted excerpt from the appropriation act because there would be no absolute or binding contract to pay in excess of funds appropriated or available in this biennium. At the same time, if the Legislature, in a succeeding biennium, should appropriate money available for such purpose, as it would likely do, the board would be bound, as it ought to be, to accept the service and to pay therefor according to the contract in such succeeding biennium.



Summarizing—the contract as submitted would not be lawful insofar as it attempts to obligate the board to pay money at times beyond the current biennium from funds which it does not now have and will not have in the current biennium, but the contract may be lawfully entered into if there is added the restrictive condition quoted herein.

### INSTITUTIONS OF HIGHER LEARNING

August 3, 1948.—048-265.

#### AGRICULTURAL SCHOLARSHIPS—UNIVERSITY OF FLORIDA

**QUESTION:** Where a board of county commissioners of any county establishes a scholarship in the Agricultural Department of the University of Florida, what part of the expenses of the holder of the scholarship may be paid from county funds?

*To Honorable B. R. Burnsed, Attorney, Board of County Commissioners, Macclenny, Florida:*

Establishment of such scholarships is authorized by section 239.25, Florida Statutes, 1941.

Section 239.28 of the statutes reads as follows:

“For the purpose of maintaining the scholarships provided for in §239.25 the board of county commissioners of each county in this state may appropriate from any funds at their disposal a sum sufficient to pay the board of the person receiving the said scholarship.

“The term ‘board,’ herein named, shall be construed to mean the regular dormitory rate and shall be paid monthly while the holder of said scholarship is in attendance at the University of Florida.”

In my opinion, the quoted section limits the amount which may be paid from county funds to “board,” which I construe to include room and meals. The amount to be allowed for room and meals would be the current cost of room and meals on the campus.

December 1, 1947.—047-398.

#### LEGISLATIVE SCHOLARSHIP—RESIDENCE FOR SCHOLARSHIP

**QUESTIONS:** 1. Where a veteran who is thirty-seven years of age and who has lived in the State of Florida one year and Alachua county six months by virtue of the fact that he is attending the University of Florida, and who meets all other requirements of the statutes for the scholarship, is such residence in the state sufficient to make him eligible for the scholarship?

2. If the foregoing question is answered in the affirmative, should the State Board of Education make an award to such individual provided he outranks others, even though the county superintendent should decline to sign the application form in the space provided for the superintendent to attest to the fact of legal residence?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 239.19, as amended by chapter 23726, Laws of Florida, 1947, provides that a house scholarship shall be awarded only to “such residents of the several counties . . . as intend to make teaching in this state their occupation,” etc. It also provides that, “Among the essential requisites for holding such scholarships are citizenship and residence in the county . . . from which they are accredited,” etc. Section 239.41, Florida Statutes, 1941, referring to Lewis Scholarships for the preparation of teachers pro-

vides among other things "that the principals and county superintendent of each county shall select and recommend, on the basis of merit, a number of high school graduates who are bona fide residents of the state of Florida," etc.

In the house scholarship statute the word "citizenship" actually means only citizenship in the United States as distinguished from aliens. Residence in Florida or in any county of the state is a question of both law and fact, and is to be determined from all of the facts in each particular case. It is largely a matter of intention, coupled with actual residence. (*Fowler vs. Fowler*, 22 So. 2d 817.) The law does not specify any period of time during which the applicant for a scholarship must be a resident.

If the applicant mentioned in the first question took up his residence with the intention of remaining permanently or with no present intention of removing therefrom, his residence is sufficient within the meaning of the scholarship statutes. It is always a question of good faith. If the county superintendent should believe that such applicant is not in good faith a resident of the state, he would not be required to certify him for award of scholarship, but, on the other hand, the applicant in such case should be appraised of his right to be heard by the state board, where the duty of final determination of the question rests.

The superintendent's signature to the application is not essential; if after the State Board should determine the applicant's qualifications favorably to him and the superintendent should still decline to sign the customary form of approval, the State Board can and should make the appointment notwithstanding.

July 19, 1947.—047-209.

#### LEGISLATIVE SCHOLARSHIPS—PAYABLE IN CASH—VETERANS

QUESTIONS: 1. Where a veteran by reason of rating on competitive examination and other qualifications was entitled to a house or senatorial scholarship, could such scholarship lawfully be withheld from him prior to the 1947 amendment of sections 239.19 and 239.22, Florida Statutes, 1941, because the veteran was entitled to educational and other benefits under the G. I. bill?

2. After the 1947 amendments of the statutes governing house and senatorial scholarships, may either of such scholarships be denied to, or withheld from, an applicant otherwise entitled to such scholarship, merely because the applicant is a veteran and entitled to the educational and subsistence allowances granted by the G. I. bill?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The question concerns veterans who have earned one of the scholarships and are also entitled to the educational benefits of the G. I. bill.

The G. I. bill provides educational funds for veterans not in excess of \$500 per year for "the customary cost of tuition and such laboratory, library, health, infirmary and other similar fees as are customarily charged, and may pay for books, supplies, equipment and other necessary expenses, exclusive of board, lodging, other living expenses and travel . . ." This is paid to the educational institution, not to the veteran. The G. I. bill also provides a fixed sum for the veteran's subsistence payable to the veteran.

Under the federal regulations, waivers of tuition, fees, etc., or a scholarship covering fees, tuition, etc., will be charged against the veteran's federal allowance; if the veteran pays such expenses he will not be reimbursed from G. I. funds. In other words, if a veteran receives a waiver of tuition, fees, etc., or has a scholarship payable to the educational institution covering such expenses, or if he pays the same with his own funds, his G. I. allowance is reduced by such amount. On the other hand, if the

scholarship is payable in cash to the veteran no deduction is made from the G. I. allowance. (See 10 Fed. Reg. 4503.)

The subsistence granted to the veteran under the G. I. bill is payable to him regardless of whether or not he may receive subsistence or allowance for subsistence from any other source.

Prior to the 1947 amendment of section 239.22 (house and senatorial scholarships), it was required that the scholarship money "shall be used to meet only such student's expenses as are listed in the catalogues of the respective institutions." The scholarships could be held only in the University and Florida State College for Women. The scholarship funds were payable direct to the institution. The scholarships were awarded on the basis of merit and competitive examinations, (sections 239.19 and 239.21), and had no relation whatever to whether the student needed financial aid. Catalogued expenses of the two named institutions of higher learning include tuition, fees, etc., as well as rooms and meals, or subsistence. It is my opinion that if a veteran satisfied the statutory requirements and his rating was such as entitled him to an award of a house or senatorial scholarship it could not be lawfully withheld from him to such extent as the veteran might have made use of the house or senatorial scholarship money for any catalogued expenses, including subsistence.

With reference to the second question and the 1947 amendments of the statutes governing house and senatorial scholarship funds, the following changes will be noted:

The 1947 amendment of section 239.19 provides that house and senatorial scholarships may be held not only in state institutions of higher learning but in any other approved institutions of higher learning in the State of Florida.

In amending section 239.22, the quoted requirement that the scholarship money should be used only to meet catalogued expenses was removed and the amendment of the same section now provides as to the house and senatorial scholarships that they "shall be paid by the comptroller to the respective state institutions of higher learning for the benefit of the scholarship holders who attend such institutions and otherwise shall be paid to the respective scholarship holders as prescribed herein." Under that provision the funds for veterans attending state institutions are paid directly to the institutions, whereas the funds payable to veterans attending non-state approved institutions are payable directly to the scholarship holder. Obviously, it was not the intention of the Legislature to give to a veteran attending a non-state institution greater benefits than those attending state institutions. Furthermore, the removal of the restrictions on the house and senatorial scholarship money by the 1947 amendment leaves little room for doubt that the Legislature intended to free the money so that it could be used for any purpose.

It is my opinion that it was the intention of the Legislature to make the house and senatorial scholarship money payable to the scholarship holder through the institution of higher learning attended by him, and that the money should be held by such institution until his attendance and satisfactory work entitled the holder to the cash distribution thereof; and further, that a veteran who holds either of said types of scholarship and attends a state institution of higher learning is entitled to withdraw such scholarship money for any purpose he may see fit on compliance with the statutes in regard to attendance, satisfactory work, etc.

In view of the federal regulations for disbursement of G. I. funds referred to and in order to remove any doubt about the veteran's right to receive G. I. bill educational benefits without deduction on account of scholarships, I hold that under the present statutes of this state, house and senatorial scholarship money is in effect payable in cash to the holder of the scholarship through the instrumentality of the state institution of high-

er learning when the institution finds that the scholarship holder has complied with the statutory requirements for receiving such funds by attendance, satisfactory work, etc.

December 2, 1947.—047-399.

**PUBLIC SERVICE—SCHOLARSHIP HOLDER—MINISTRY AS  
PUBLIC SERVICE**

**QUESTIONS:** 1. May the holder of a senatorial state scholarship satisfy his obligations of service by serving in the profession of the ministry or as a church leader?

2. May those scholarship holders who are required to satisfy their scholarship obligation by teaching, satisfy that obligation by teaching in any other than a tax-supported school or college?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 239.20, as amended by section 40 of chapter 23726, Laws of Florida, 1947, provides that senatorial state scholarships "may be held in any professional or vocational school or college or any of the institutions of higher learning located in the State of Florida and approved by the state board, which offers preparation for public service in connection with state, county, or municipal governmental functions in Florida, as prescribed by the state board." State Board regulation of July 3, 1947, defines preparation for public service in connection with state, county or municipal governmental functions as "preparation which fits one for teaching in public schools, for social welfare work, for public health, and for employment in a technical or professional capacity with municipal, county or state offices, commissions, boards, or bureaus." Section 239.24, as amended by chapter 23726, sets up the manner by which service obligations may be performed, using these words: "... by service in connection with the state, county or municipal government in Florida." It is my opinion that "public service in connection with state, county or municipal governmental functions" or "service in connection with the state, county or municipal government in Florida" do not include the profession of the ministry and the holder of a senatorial state scholarship cannot satisfy his obligation of service by serving as a church leader or as a minister.

Referring to service which holders of teaching scholarships owe, section 239.24 uses this language: "If, for any reason, a person ceases to teach in the public schools of Florida . . ." On the same subject section 239.44, as amended by chapter 23726, Laws of Florida, 1947, uses the same words. The holders of scholarships who go into teaching can satisfy their service obligation only by teaching in tax-supported schools or colleges.

July 15, 1947.—047-199.

**LEWIS SCHOLARSHIP—SUPPLEMENTING FUNDS**

**QUESTION:** In view of the fact that chapter 23726, Laws of Florida, 1947, became effective on July 1, 1947, may the Lewis preparation-for-teaching scholarships be supplemental under section 51 of said chapter and the state board regulation adopted in pursuance thereof, for that part of the first term of the summer school which preceded the effective date of the act?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 51 of chapter 23726, Laws of Florida, 1947, amending section 6 of chapter 22944, Laws of Florida, 1945, (section 239.42 Cum. Supp.), contains the following provision:

"The State Board shall prescribe regulations for the payment of scholarship funds to the institutions for the benefit of scholar-



ship holders who take additional work during summer terms in order to complete their college training at an earlier date."

Pursuant to that section the State Board of Education has adopted regulations whereby house and senatorial and Lewis scholarship holders who wish to complete their college training earlier by attending summer school are allowed one-third of the value of the academic year scholarship for attendance at the summer school. If only the first term of the summer school is attended a lesser but proportional amount is allowed.

The great shortage of teachers makes it advantageous to the state that the young men and young women who are planning to teach complete their training as rapidly as possible by attending summer school, and one of the purposes of the quoted provision was to encourage future teachers to expedite their training. The ultimate cost to the state is the same whether or not they attend summer school.

The first term of the summer school began on June 16 and will end on July 24. It will be observed that only one-third of the first term of the summer school had elapsed at the effective date of chapter 23726. It is my opinion that it was the intention of the Legislature to authorize the additional allowance for the whole term current on the effective date of the act.

July 19, 1947.—047-208.

#### LEWIS SCHOLARSHIPS—PAYABLE—CASH—VETERANS

QUESTIONS: 1. Where a veteran by reason of rating on competitive examination and other qualifications was entitled to a Lewis scholarship, could such scholarship lawfully be withheld from him prior to the 1947 amendment of chapter 22944, Laws of Florida, 1945, because the veteran was entitled to educational and other benefits under the G. I. bill?

2. After the 1947 amendments of the statutes governing Lewis scholarships, may either of such scholarships be denied to, or withheld from, an applicant otherwise entitled to such scholarship, merely because the applicant is a veteran and entitled to the educational and subsistence allowance granted by the G. I. bill?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The question concerns veterans who have earned one of the scholarships and are also entitled to the educational benefits of the G. I. bill. In another opinion of this date addressed to you on house and senatorial scholarships, I discussed the G. I. bill and federal regulations with reference to allowance under the G. I. bill in case of scholarships, etc. What is said there applies equally here to a Lewis scholarship.

The Lewis scholarship awards under the 1945 act were based on merit and competitive examination and without regard to the financial needs of the student. The Lewis scholarship award under the 1945 act was paid direct to the student. He could use the money for any purpose whatsoever so long as he complied with the statutory requirements as to attendance, satisfactory work, etc.

It is my opinion that a veteran who had earned a Lewis scholarship under the 1945 act establishing such scholarships could not lawfully be denied the scholarship because of the educational and other benefits to which he was entitled under the G. I. bill. This is in answer to the first question.

The amendment of the Lewis scholarship statutes in 1947 changed the method of payment and under the present act the funds are payable to the state institution of higher learning "for the benefit of the scholarship holder." (Chapter 23726, Laws of 1947, Section 51.)

It is my opinion that it was the intention of the Legislature to make the Lewis scholarship money payable to the scholarship holder through the institution of higher learning attended by him, and that the money should be held by such institution until his attendance and satisfactory work entitled the holder to the cash distribution thereof; and further, that a veteran who holds a Lewis scholarship is entitled to withdraw such scholarship money for any purpose he may see fit on compliance with the statutes in regard to attendance, satisfactory work, etc.

Lewis scholarship money, like house and senatorial scholarship money is in effect payable in cash to the holder of the scholarship through the instrumentality of the state institutions of higher learning when the institution finds that the scholarship holder has complied with the statutory requirements for receiving such funds by attendance, satisfactory work, etc.

January 11, 1947.—047-3.

#### SCHOLARSHIP—CREDIT IN REPAYMENT

**QUESTION:** A young lady was awarded a Lewis scholarship and attended Florida State College for Women in 1945-46. She executed three notes of \$133.38, for each of the three quarters she attended F. S. C. W. In September, 1946, she surrendered the scholarship in order to teach. After teaching three months she resigned on account of inadequate salary. May the first of the three notes executed by the teacher be legally cancelled by reason of her teaching service of three months?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 239.44, Cumulative Supplement (chapter 229.44, section 8), in part, reads as follows:

"At the expiration of each school year of service to a teacher in the public schools of Florida by a person receiving a scholarship for the preparation of teachers, the state superintendent shall advise the state treasurer to cancel the oldest notes given by such person covering scholarships for one year and the state treasurer shall forthwith cancel said oldest notes and interest accrued thereon."

It is my opinion that it was not the intention of the Legislature to require a full year of teacher service before any credit whatever could be allowed on these scholarship notes, but rather that a proportionate credit could be allowed for a part of a year's service as a teacher; in other words, for three months of service as a teacher, credit may be allowed for three-ninths of \$400.00, the annual scholarship award.

July 31, 1947.—047-254.

#### "RESPONSIBLE CITIZEN"—DEFINITION OF CITIZEN— ENDORSEMENT OF NOTE

**QUESTIONS:** 1. What is meant by "responsible citizen" as used in section 239.24, Florida Statutes, 1941, as amended by section 42 of chapter 23726, acts of 1947, and section 7 of chapter 22944, Laws of Florida, acts of 1945 (239.43 Cum. Supp.), as amended by section 52 of chapter 23726, acts of 1947?

2. Who is to determine whether the endorser is a "responsible citizen" and to what extent is an investigation required?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 239.24, Florida Statutes, 1941, as amended by chapter 23726, acts of 1947, reads in part:

"Each person who receives a senatorial or representative scholarship shall execute a promissory note under seal which shall be endorsed by his parent or guardian, or if he is over twenty-one years of age, by some responsible citizen, and shall deliver said note to the president of the institution he is attending, or to his representative. Each such note shall be payable to the state treasurer, for the amount of the semi-annual or quarterly payment and shall bear interest at the rate of five per cent from the date of the note. The president shall hold said note until it has been paid or cancelled as prescribed hereinafter."

Section 239.43 Cumulative Supplement, as amended by section 52 of chapter 23726, Laws of Florida, 1947, relates to scholarships for the preparation of teachers and contains a provision identical with that quoted with reference to senatorial and representative scholarships.

It will be noted that when the scholarship holder is a minor, the promissory note is required to be endorsed by his parent or guardian, without any regard whatsoever as to whether the parent or guardian is either financially or morally responsible for the obligation. In such cases the statute would be satisfied even if the parent or guardian were both insolvent and lacking in moral responsibility.

The statute requires endorsement of the notes by a "responsible citizen" only when the holder of the scholarship is over twenty-one years of age, that is to say, when the holder himself is legally liable. Considering the whole statute, and noting the absence of any requirement of financial responsibility on the part of the endorser where the scholarship holder is a minor, it does not appear that these statutes require that the endorser be a person who has sufficient property over and above his exemptions to satisfy a judgment on the note. It is my opinion that in these statutes "responsible citizen" means nothing more than a citizen who might reasonably be expected to be able to pay the note and recognize his moral and legal responsibility for the payment thereof.

Even more vague is the statute when considered in connection with the second question. The statute is silent as to who shall pass upon the responsibility of the citizen who endorses the note. The request for opinion indicates the assumption that the business manager of the institution of higher learning is clothed with that duty. I wish to point out, however, that the senatorial and representative scholarships may be held in non-state institutions and obviously the Legislature did not intend to impose upon, or entrust with, the president or business manager of private institutions the duty to see to the responsibility of endorsers of promissory notes belonging to the state. There are other reasons supporting that conclusion.

The award of the scholarships and all matters pertaining to the scholarships are responsibilities of the State Board of Education, and it is my opinion that the duty rests with that board, directly or through a committee or other agency appointed by it, to determine and pass upon the responsibility of the citizen endorser. Such investigation of the proposed endorser should be made as would ordinarily be made by a prudent business man—perhaps through the county superintendent, a county school board member, or other reliable person. Appropriate regulations covering these matters should be adopted by the State Board of Education.

July 8, 1947.—047-196.

#### SCHOLARSHIPS—FORM OF ENDORSEMENT—NOTE

QUESTION: How should the senatorial scholarship notes be endorsed?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The 1947 amendment of section 239.24 (house and senatorial scholarships), and of section 239.43 Cum. Supp., (section 7 of chapter 22944), require endorsement of the promissory note by the parent or guardian of the scholarship holder, or if he is over twenty-one years of age, it may be endorsed by any responsible citizen. The endorsement is accomplished by the signature of the endorser on the back of the note.

June 2, 1947.—047-153.

#### COLLEGE OF FORESTRY—UNEXPENDED BALANCE

**QUESTION:** Does an unexpended balance in the annual appropriation provided by section 241.09, Florida Statutes, 1941, for the College of Forestry, revert at the end of the year, or should it be carried over for expenditure in the succeeding year?

*To Honorable C. M. Gay, State Comptroller:*

Section 241.08 creates and establishes a "College of Forestry" at the university. Section 241.09 reads as follows:

"There is appropriated out of the general fund of the State of Florida, and made available to the board of control, the sum of thirty-two thousand five hundred dollars, annually, or as much thereof as may be found necessary, for the purpose of establishing and maintaining either a forestry department, a school of forestry, or a college of forestry in the University of Florida for the teaching of forestry."

It will be observed that the annual appropriation is not \$32,500 but only "as much thereof as may be found necessary." Any part of the maximum amount which was not used or found necessary for the maintenance of the college of forestry during any year was not appropriated by the act, and there is no unexpended balance to be carried over. This is in harmony with my opinion dated July 30, 1946, No. 046-328, construing a similar provision in chapter 22938, Laws of Florida, 1945.

November 19, 1947.—047-388.

#### INSTITUTE OF GOVERNMENT—FUNDS OF INSTITUTE—RECEIPTS FROM BOOKS

**QUESTION:** Does the Institute of Government have the authority to expend for the purposes for which it was created monies accruing from the sale of publications and as the result of services performed by it?

*To Honorable S. Sherman Weiss, Institute of Government:*

Accompanying the inquiry is a copy of a resolution of your board of trustees providing for deposit in the state treasury of all receipts of the Institute of Government, for the use of all receipts from printing and publications for other printing, preparation and distribution of publications, and for the use of receipts for all other activities for purposes for which they were collected.

Among the statutory duties of the institute as set up in section 241.51 is the duty "to prepare manuals and other guides for the use of state, county and municipal officers and employees."

Section 241.56 authorizes the institute to conduct courses on various subjects related to government, finance, etc., and to charge fees for such courses.

Section 241.57 reads, in part, as follows:



"No money hereinafter appropriated or accruing to the Institute may be disbursed by the Comptroller except by warrant upon the state treasurer pursuant to vouchers approved by the trustees . . . All receipts by the institute as herein authorized shall be deposited in the state treasury to be disbursed only as authorized by this law."

While the statute is far from clear I think the authority to prepare manuals and guides for the designated officers implies authority to put them into print in one form or another, as may be determined by the institute, and if there are sufficient funds available in the institute's appropriation. If such manuals are published only such number should be printed as might reasonably be expected to satisfy the need or demand therefor. Insofar as funds appropriated by the Legislature for expenses of the institute may be used for the publication of such manuals, proceeds from the sale thereof would, in effect, be a refund, recoupment, or reimbursement of such expenses and therefore, in my opinion subject to disbursement again for lawful expenses of the institute.

When courses are conducted, as authorized by section 241.56, I presume the fees would be estimated and fixed in an amount to produce approximately the cost likely to be payable as compensation to the instructional personnel employed to give such courses, and such fees would also be a refund or recoupment of expenses.

It is my opinion that section 241.57, aided by the implications of other sections of the institute of government act, is sufficient authority for the expenditure of receipts from fees collected from those attending courses conducted by the institute and from proceeds of sale of publications authorized by the statute, for any lawful expense of the institute.

### MISCELLANEOUS EDUCATIONAL LAWS

August 27, 1948.—048-297.

#### SALARY OF PRESIDENT—SCHOOL FOR DEAF AND BLIND

**QUESTION:** May the Board of Control add to the amount set up in the appropriation act as salary for the president of the Florida School for the Deaf and Blind in lieu of perquisites heretofore enjoyed by the president of that institution over a period of many years, an amount determined by the board to be the value of such perquisites?

*To Honorable C. M. Gay, State Comptroller:*

Section 242.40, Florida Statutes, 1941, fixes the salary of the president of the Florida School for the Deaf and Blind at \$3600 per year. The Budget Commission's report to the Legislature for the biennium beginning July 1, 1947, listing details of salary, includes salary of \$5000 for the president of that institution. The General Appropriation Act of 1947 includes lump sum appropriation of salaries for that school in the same amount as the lump sum recommendations in the Budget Commission's report. Under these facts he would be entitled to the \$5000 as set up in the Budget Commission's report. (Williams v. Lee, 191 So. 697.)

In addition to that salary, the president of the institution received valuable perquisites for many years, as do certain other state employees. These consisted of residence or apartment, servants, foods, laundry, and other living expenses. The board determined that it was to the best interest of the state to discontinue all of these perquisites enjoyed by the president of the institution except an apartment in the administration building and utilities. After carefully considering the cost to the state of each item of the perquisites other than housing and utilities, the board determined their cost and value at \$4500 per year. The board then ordered discontinuance thereof and substitution of their money value by way of addition to the president's \$5000 salary payable in money.

I am also informed that the board in determining what salary should be recommended for the president of the institution in making up the budget from year to year took into consideration the perquisites which the head of that institution enjoyed under a custom of many years, and in so doing, made those perquisites a part of his salary or compensation. In other words, his salary or compensation for services consisted of certain perquisites and a certain amount of money. The board is now converting some of those perquisites into money.

It is my opinion that, under the circumstances set out, the salary or compensation having never been increased, the board has no authority to make that change. The question is answered in the negative.

April 7, 1947.—047-96.

#### ACCEPTANCE OF FEDERAL FUNDS—REGULATIONS

**QUESTION:** On December 12, 1945, the State Board of Education adopted certain regulations relating to acceptance of federal funds, services, commodities, etc., by county boards of public instruction subject to the attorney general's approval of the legality of such regulations. Are such regulations valid and legal?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The regulations which were submitted with the question were adopted in pursuance of chapter 23136, Laws of Florida, 1945. That act required the State Board of Education to prescribe regulations under which agreements or arrangements might be made with federal government agencies for funds, services, commodities or equipment available for the public schools. It also provided that all such agreements or arrangements made by the public schools should be entered into in accordance with regulations prescribed by the State Board and in no other manner.

Frequently federal grants and donations are contingent upon obligations to be assumed by the state or political subdivision of the state in connection with the grant. Chapter 23136, Laws of Florida, 1945, appears to have been designed to safeguard counties from assuming obligations beyond their financial capacity in connection with federal grants. The regulations of December 12, 1945, are, in my opinion, within the design and purpose of chapter 23136 and are consistent with the several statutes requiring state supervision of county school board budgets.

It is my opinion the regulations are valid and legal.

#### GENERAL PROVISIONS FOR INSTITUTIONS OF HIGHER LEARNING

October 30, 1948.—048-336.

#### SCHOLARSHIPS—HOUSE AND SENATORIAL— STATE BOARD REGULATIONS

**QUESTION:** Are the proposed regulations, described below, as submitted by the State Board of Education, legal? The regulations pertain to default in scholarship notes.

*To Honorable Colin English, Secretary, State Board of Education of Florida:*

Some of the proposed regulations, submitted for adoption at the meeting of the State Board of Education on September 28, which relate to the handling and collecting of scholarship notes which may become in

default are not in accord with the statutes—section 239.44, as amended. Other regulations seem to be clearly and fully covered by the statutes.

After conferring with Dr. W. T. Edwards on the practical problems involved, I suggest that, in lieu of the four proposed regulations, the following be substituted:

"The President of each institution of higher learning where the scholarship was held shall give such assistance as may be reasonably requested by the State Treasurer in the collection of scholarship notes which have become payable by reason of the scholarship holder failing to perform services in satisfaction of his scholarship note."

A proposed amendment to regulation numbered 1, adopted July 3, 1947, has also been submitted in regard to house and senatorial scholarships, as follows:

"Approved institutions shall include only those institutions whose graduates are granted 'graduate' teaching certificates by the State Superintendent under regulations prescribed by the State Board or are listed as Junior Colleges participating in the Foundation Program Fund."

Section 239.22, Florida Statutes, 1941, as amended by chapter 23726, Laws of Florida, 1947, authorizes house and senatorial scholarships at "an institution of higher learning, located in the State of Florida and approved by the State Board." The question, therefore, is whether junior colleges authorized by sections 242.41 to 242.43, Statutes of 1941, as amended by chapter 23726, may be considered "institutions of higher learning" within the meaning of the foregoing quotation from section 239.22.

The junior college as now authorized by sections 242.41 to 242.43 is an adjunct or extension of the public school system. Junior colleges may be separately organized for grades 13 and 14 or may be organized as a part of a secondary school, including any or all secondary school grades. While a part of the public school system, they are nevertheless subject to additional and special administrative regulations and at all times operate under standards established by the State Board of Education; they exist only with State Board approval. Advisory committees appointed by the State Board are authorized for the better administration of the junior colleges. They are headed by a dean, who must meet State Board qualifications. (See section 242.42.) An accredited junior college with State Board approval gives substantially the same work as the first two years at the several state universities and colleges.

Section 227.13 (1) (b) defines institutions of higher learning as state supported institutions offering work above the public school level. It is clear, however, that the words "institution of higher learning," have a different meaning in section 239.22 because that section allows the scholarship to be held at any institution of higher learning located in the State of Florida and approved by the State Board. It does not require the institution to be a state institution. I think it may be safely held that the Legislature in using the words, "institution of higher learning," in section 239.22 intended to include any institution of higher learning above the twelfth grade, located in the State of Florida and approved by the State Board of Education.

It is my opinion, therefore, that the house and senatorial scholarships may be held in a junior college in the State of Florida established in accordance with sections 242.41 to 242.43 and approved by the State Board of Education.

I suggest that the regulation be worded as follows:

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"Approved institutions shall include only (1) those institutions whose graduates are granted 'graduate' teaching certificates by the State Superintendent under regulations prescribed by the State Board of Education, and (2) Junior Colleges approved by the State Board of Education and entitled to participate as such in the Foundation Program Fund."

The foregoing suggested regulations, in my opinion, will be valid regulations when adopted by the Board.



## CHAPTER XV

### MILITARY CODE AND RELATED MATTERS

#### MILITARY CODE

July 1, 1948.—048-222.

#### NATIONAL GUARD ENTERTAINMENT—LICENSE TAX

**QUESTION:** Are local units of the National Guard of this state, which sponsor or put on dances, boxing exhibitions, local carnivals, minstrels, etc., required to obtain occupational licenses as a condition to putting on such enterprises in this state?

*To Honorable Mark W. Lance, Brigadier General, AGD, FNG,  
The Adjutant General, St. Augustine, Florida:*

It appears from the request for opinion that local units of the National Guard in the various counties and cities of the state sponsor dances, boxing exhibitions, local carnivals, minstrels, etc., and revenues received from the holding of such enterprises are held under the control of the unit commander and post council in the unit organizational fund. It also appears that such funds "accrue to the benefit of the unit as a whole, and . . . are spent for the improvement of armory facilities and the comfort and convenience for the personnel of the unit."

Under the statutes of this state the Armory Board is charged with the supervision and control of all military buildings and real property within the state applied to military use. The communities in which units of the National Guard are established have the duty of supplying the necessary personnel and adequate housing for the organization. The Armory Board has authority to receive from counties, municipalities, and other sources, donations of land and contributions of money to aid in providing, improving and maintaining armories throughout the state. (Section 250.48, Florida Statutes, 1941.) As the funds that accrue, from the aforementioned enterprises held in the armories, are spent for the improvement of armory facilities and the comfort and convenience of the personnel of the military units, it seems that they may well be within the statutes, supra. A unit of the National Guard may become a corporation with power to acquire, own, hold and dispose of property. (Section 250.23, Florida Statutes, 1941.)

A volunteer military organization has been held tax exempt as an institution of purely public charity, and incidental receipts of income from its armory have been held not to preclude exemption from taxation. (61 C. J. 505, section 611; see also 2 Cooley on Taxation, 4th. Ed., 1544, section 739; Philadelphia v. Keystone Battery A, etc., 169 Pa. St. 526, 32 Atl. 428.)

Although pugilistic exhibitions are generally prohibited in this state the statutes permit them to a limited extent by certain organizations, including companies or detachments of the Florida National Guard. (Section 548.03, Florida Statutes, 1941.)

Under the rules and regulations of the United States Army, profits from army post exchanges are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops. The United States Supreme Court has held that army post exchanges are arms of the government. (Standard Oil Company v. Johnson, 316 U. S. 481, text 484 and 485, 62 S. Ct. 1168, 86 L. Ed. 1611, text 1615 and 1616.)

Under the foregoing authorities and observations, if the dances, boxing exhibitions, local carnivals, minstrels and similar enterprises are put on and sponsored by units of the National Guard of this state and the proceeds therefrom are used entirely and exclusively for the use and benefit of such National Guard units, and not diverted to other purposes, such unit of the National Guard of this state would seem to be exempt from the operation of the occupational license tax laws of this state. This exemption is based upon two grounds, first, that the National Guard unit is an arm of the state and second that the said enterprises and the funds derived therefrom are in the nature of public charities for the benefit of the personnel of the National Guard of this state. This exemption should be allowed only so long as the enterprises are put on by the National Guard unit with unpaid personnel and the proceeds are used entirely for the benefit of the said National Guard.

September 23, 1948.—048-316.

#### NATIONAL GUARD ENTERTAINMENT—LICENSE TAXES

**QUESTION:** Where local units of the National Guard of this state sponsor or put on dances, boxing exhibitions, local carnivals, minstrels, etc., and pay compensation for the purpose of securing orchestras, professional or semi-professional entertainers, boxers, etc., in connection with such enterprises, are they required to obtain occupational licenses as a condition to putting on such enterprises in this state?

*To Honorable Mark W. Lance, Brigadier General, AGD, FNG,  
The Adjutant General, St. Augustine, Florida:*

I rendered an opinion, on July 1, 1948, (048-222), in which I held that such enterprises were not subject to a license tax so long as they are put on with unpaid personnel of the guard units. I am now called upon to determine whether or not that opinion should be extended so as to include enterprises where orchestras, professional or semi-professional entertainers, boxers, etc. are employed by the National Guard units in connection with such enterprises.

In connection with the request for opinion it seems that the question may also include the right of municipalities to require an occupational license tax when the entertainments are put on by the guard units in armories belonging to the state. In *Ex Parte Means*, ..... Cal. 2d....., 93 P. 2d. 105, 123 A. L. R. 1378, the court held that where employees or agents of the state are employed and performing work upon state property located within a municipality that such municipality may not by ordinance require that such employee or agent be licensed by the municipality as a condition to performing work on the state property of the state. Such municipality may have no jurisdiction over the state property (see annotation in 123 A. L. R. 1378). If the employment by the National Guard unit amounts to an employment by an agency of the state in connection with state business or property then the municipality would seem to be without authority to levy an occupational license tax in connection with such employment and work.

The answer to the question depends to a great extent upon the question of whether or not the enterprise is sponsored by a state agency or by a group of individuals. A unit of the National Guard may become a corporation with limited corporate powers (section 250.23, Florida Statutes, 1941), or may adopt a constitution and by-laws (section 250.24, Florida Statutes, 1941). Federally recognized units of the Florida National Guard are a part of the National Guard of the United States (title 32, sections 4-4b, United States Code). The Armory Board is authorized to receive donations and contributions for the improvement and maintenance of the armories (section 250.48, Florida Statutes, 1941). Army post exchanges have been held to be agencies of the federal government (*Standard Oil Company v. Johnson*, 316 U. S. 481, 81 L. Ed. 1611, 62 S. Ct. 1168). The general rule

seems to be that the state and its agencies are not within the purview of license and tax laws unless clearly included therein either by express provision or by clear implication (53 C. J. S. 558, section 29).

I am of the opinion that if the proceeds from the enterprises in question, although the enterprises are put on with paid personnel, are used exclusively for improvement of the armories, or for the recreation of the members of the National Guard or to add to their pleasure and comfort, all within the rules and regulations of the Military Department, that the enterprises may be said to be put on by an agency of the state and therefore exempt from occupational license taxes; otherwise they would seem to be subject to such taxes. The question of whether or not the enterprises are put on by the National Guard units, as such, or by the personnel of such units in their individual capacities is a question of fact that must be determined by the taxing officials.

The foregoing question must be answered in the negative where the enterprises in question are put on by the National Guard unit as an agency of the state; but in the affirmative when the said enterprises are put on by the personnel of the National Guard units in their individual capacities.

September 2, 1948.—048-285.

#### RETIRED NATIONAL GUARD OFFICER—STATE EMPLOYMENT

**QUESTIONS:** 1. May a retired officer of the National Guard who is drawing retirement pay under section 250.76, Florida Statutes, 1941, draw compensation as assistant state attorney at the same time?

2. If the foregoing question is answered in the affirmative, is the officer eligible to continue as a member of the state officers and employees' retirement system?

*To Honorable C. M. Gay, State Comptroller:*

Section 250.76 provides that on reaching the age of sixty-four, after not less than thirty years of service as an officer or enlisted man in the organized militia of the state, a person shall be eligible to retire with pay in an amount equal to one-half of the base pay currently prescribed in army pay tables for similar grades and periods of service of personnel in the United States army. The statute further provides that no person shall be eligible for such retirement pay who is at the same time receiving retirement pay from the State of Florida or the United States under some other provision of law.

No one, I think, would contend that a state officer or employee, after the requisite years of service, could go on retirement pay and continue in his former job drawing pay therefor; yet there is no material difference in going on retirement under a state act and accepting employment with pay in a different state agency. Furthermore, retirement allowances, to a large extent, are based upon the theory that the pensioner, after long service, has reached an age where he should retire; for that reason there is a certain amount of inconsistency in continuing in public service and being on retirement pay at the same time.

Aside from those considerations, it is contrary to the public policy of the state for anyone to receive retirement allowance from the State of Florida and at the same time to hold a state office or employment and draw compensation for the same.

The foregoing conclusions require the withholding and suspension of all retirement allowance for any part of the time for which the officer or employee receives state compensation for services as such officer or employee. The statute involved in this question does not authorize the more severe penalty imposed by the state officers and employees' and county officers and employees' retirement acts, both of which forfeit all right to

retirement allowance if the officer or employee accepts public employment on the same level or certain other levels.

In view of the foregoing answer to the first question the second question requires no answer.

(see 048-285 amended)

October 14, 1948.—048-285. (Amended)

#### RETIRED NATIONAL GUARD OFFICER—STATE EMPLOYMENT

QUESTIONS: (The following questions were answered in opinion No. 048-285, dated September 2, 1948, which opinion has been recalled and amended to the extent herein contained.)

1. May a retired officer of the National Guard who is drawing retirement pay under section 250.76, Florida Statutes, 1941, draw compensation as assistant state attorney at the same time.

2. If the foregoing question is answered in the affirmative, is the officer eligible to continue as a member of the state officers and employees' retirement system?

*To Honorable C. M. Gay, State Comptroller:*

In opinion No. 048-285 dated September 2, 1948, I held that a retired officer of the National Guard could not be paid retirement pay under the provisions of section 250.76, and, for the same period of time, salary as assistant state attorney. The opinion was based upon what I considered to be the public policy of the state as indicated by recent statutes and court decisions. Also, while the statute does not specifically prohibit the drawing of National Guard retirement compensation by one holding a state office, even the national guard retirement statute, section 250.76, does specifically prohibit retirement pay under that statute by any person who is at the same time receiving retirement pay from the State of Florida or the United States.

Since that opinion was rendered I have given further thought to the problem, realizing that I may have overlooked the circumstance that both civilian and military employment are involved in the question. Service in the National Guard is on a different basis from civilian employment. While public policy may prohibit civilian reemployment of a retired civilian officer or employee, it does not necessarily follow that the same rule would apply where the retirement is under the National Guard retirement act.

I have reached the further conclusion that on a question like this, involving, as it does, very substantial and important rights of public officers and employees, and containing serious uncertainties, an opinion of the attorney general is scarcely sufficient as a basis for its determination, and that such a question should be submitted to the binding and final determination of a court.

Having reached this conclusion, I recall the aforementioned opinion of September 2, and suggest that until the Legislature clears up the uncertainty or a court holds otherwise, payment of both salary and retirement pay be made to the public officer involved. I also recommend that the question be submitted promptly to the court for determination. I shall be glad to represent you in such suit.

January 9, 1948.—048-13.

#### LEAVE FOR TRAINING—ENLISTED MAN'S LEAVE— NATIONAL GUARD

QUESTION: May a state employee who is an enlisted man in the National Guard be granted a leave of absence for attendance at annual



training camps, encampments, etc. of the National Guard without deduction from his salary, or from his accrued vacation time?

*To Mr. M. Robert Barnett, Executive Director, Florida Council for the Blind, Tampa, Florida:*

Reference is made to my opinion of June 2, 1947, No. 047-152. That opinion construed section 115.07 and related to leave of absence of state officers and employees who are commissioned reserved officers of the United States military and naval services. That section does not cover enlisted men. However, a similar provision has been made for enlisted men and will be found in section 250.28, which reads as follows:

"All officers and employees of the State of Florida, and of the several counties and municipalities within the State of Florida, who are members of the Florida national guard, shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense exercises or other training ordered under the provisions of this chapter, provided that leaves of absence without loss of pay, granted under the provisions of this section, shall not exceed seventeen days at any one time."

Under the quoted section, an enlisted man would be entitled to leave of absence without deduction from pay for a period not to exceed seventeen days at any one time.

In the opinion of June 2, 1947, I said:

"This leave of absence is for a patriotic service to the country. It in no manner affects his right to the annual two weeks vacation with pay customarily allowed public employees."

That interpretation applies with equal force to an enlisted man granted a leave of absence under the foregoing quoted statute.

August 22, 1947.—047-268.

#### FLIGHT PAY—NATIONAL GUARD OFFICERS—BASIS OF PAYMENT

QUESTION: Are National Guard officers, who hold federally recognized aeronautical rating, entitled to flying pay, when engaged in active service for the state under proper orders and required to participate in aerial flights?

*To Honorable C. M. Gay, State Comptroller:*

Section 250.33, Florida Statutes, 1941, as amended, provides that "officers . . . when employed in active service by the state . . . shall receive . . . the base pay as is now or may hereafter be prescribed in the U. S. Army pay tables for similar grades of personnel in the U. S. Army and a subsistence allowance of two dollars per day, together with the necessary travel allowance." Section 250.37, Florida Statutes, 1941, provides that "troops ordered into the service of the state . . . shall be deemed to be in active service. Officers . . . employed under orders of the governor . . . shall be deemed in active service when it is so specified in orders. Orders shall specify in every case if pay and travel expenses are allowed."

Under section 118, title 37, United States Code, officers are entitled to "receive an increase of fifty per centum of their pay when . . . required to participate regularly and frequently in aerial flights."

In view of the foregoing, I am of the opinion that when officers are employed in active service by the state and are required to participate regularly and frequently in aerial flights, such officers are entitled to an increase of fifty percentum of their pay.

However, I am further of the opinion that since section 250.33 of Florida Statutes, 1941, provides that officers so employed shall receive the base pay prescribed for similar grades of personnel in the U. S. Army, the criterion used by the U. S. Army regarding "required to participate regularly and frequently in aerial flights" is mandatory in the case of Florida National Guard officers.

June 27, 1946.—046-277.

#### LOST CLOTHING—METHOD OF REPAYMENT

QUESTION: "May Florida State Guard funds, received under the provisions of section 250.47, supra, be used to reimburse the Federal Government for the loss of items of lost clothing?"

*To Honorable Bryan Willis, State Auditor:*

Section 251.02, Florida Statutes, 1941, provides that the governor may prescribe rules and regulations for the organization, administration, equipment and maintenance of the Florida State Guard. By command of the governor, rules and regulations were promulgated and adopted August 1, 1943. Paragraph 10, section 1 thereof, provides:

"Property Accountability: Bonds: Each Company Commander will be held both responsible and accountable for all arms, uniforms and equipment issued for use by his company, and shall furnish a bond, payable to the Governor of the State of Florida in the sum of \$1,000.00 with such surety as may be required by the Adjutant General, conditioned for the faithful care and safe-keeping of such public property as may be at any time committed to his custody. Applications for surety bonds will be filed by the Adjutant General and premiums will be paid by the State." Paragraph 6, section 1 thereof provides:

"Administration: The Florida State Guard shall be governed, disciplined, trained and equipped in accordance with the provisions contained in the Military Code, State of Florida, insofar as may be practicable, and in accordance with such Florida State Guard regulations as may be promulgated by the Governor from time to time."

The Florida State Guard is, therefore, governed by the Military Code, chapter 250, Florida Statutes, 1941, insofar as the said code is applicable and not inconsistent with the rules and regulations of the Florida State Guard.

Section 250.47, supra, provides for the annual maintenance allowance to the commanding officer of the various units of command of the Florida National Guard. This allowance is for the maintenance and care of property entrusted to them; however, the expending of such allowance money is governed by such rules and regulations as may be prescribed in the regulations for the Florida National Guard. (Paragraph 3, section 250.47, supra.) General orders No. 13 issued under date of August 30, 1927, by Brigadier General J. Clifford Foster, the adjutant general, is such a rule and regulation and provided therein is this provision:

"Disbursements: The term 'For the maintenance of such organizations' shall be understood to limit disbursements to such purposes as are specifically authorized under these regulations, and such other purposes only as may be specifically authorized from time to time by the adjutant general. No disbursement will be ordered by a commanding officer which is not authorized under these regulations, or for which authority has not been obtained by application to the office of The Adjutant General."

It is not possible to give a definite answer to the question for the reason that the company commander is responsible only in case of failure

to exercise faithful care and safekeeping of the property. In other words, all of the material facts surrounding the missing of each and every article would have to be determined before ruling on the negligence of the officer. The adjutant general advises me that when similar situations arise in the Florida National Guard that they conduct a survey, making a full report of all the facts surrounding the missing articles; that some of the surveys are approved while others are disapproved.

It is my opinion that under the provisions of section 251.02 and section 251.15, Florida Statutes, 1941, which provides:

"The expenses incurred in carrying out the provisions of this chapter shall be paid from the fund for current expenses of the Military Department, by whatever name or title such fund shall be known and designated, upon requisition of the Adjutant General, approved by the Governor."

That this problem can be solved by modification of the Florida State Guard rules to provide for reimbursement to the federal government for such missing property.

October 18, 1948.—048-329.

#### ARMORY BOARD CONTRACT—TERMITE CONTROL—GUARANTEE

**QUESTION:** May the State Armory Board enter into a termite control contract and guaranty agreement with an exterminating company for termite treatment of an armory building carrying with it a five-year guarantee against termite re-infestation and provide for the payment of the same from current appropriations?

*To Honorable C. M. Gay, State Comptroller:*

Although the instruments furnished with the request for opinion may indicate that the agreement in question was one for services over a period of five years, the said contract and guaranty actually entered into was for present services with a five-year guarantee against termite re-infestation, said guarantee, as indicated by the contract, being bonded by the Massachusetts Bonding and Insurance Company.

In the light of the original contract and guaranty exhibited as aforesaid, I find nothing illegal about the contract and guarantee. The compensation to be paid is for present services, with the guarantee as only an incident thereto, and is not for services to be performed within other annual periods. Any inspections to be made or services to be performed by the exterminating company in the future will be at their expense and not at state expense. The question as restated should be answered in the affirmative.

## CHAPTER XVI

### PUBLIC LANDS AND PROPERTY

#### INTERNAL IMPROVEMENT FUND

October 15, 1947.—047-335.

#### SALE OF SHELL—PROCEEDS FROM SHELL SALE—DISPOSITION OF PROCEEDS

QUESTION: In view of sections 270.12-13, Florida Statutes, 1941, whether or not in pursuance of section 4 of chapter 24121, acts of 1947, shall "all of the proceeds of such sales or leases" be construed to mean the full amount to be paid to the State Board of Conservation account of the "Oyster Conservation Fund" or that amount after deducting twenty-five per cent for the state school fund?

*To Honorable F. C. Elliott, Secretary and Engineer, Trustees of the  
Internal Improvement Fund:*

Section 4 of chapter 24121, Laws of Florida, 1947, reads as follows:

"Any and all funds hereafter received or collected by the trustees of the Internal Improvement Fund under the provisions of Section 253.45, Florida Statutes, 1941, or any amendment thereof, for or on account of the sale of dead shell, or for the right or privilege to take shell or shell deposits from the sovereignty lands of the State of Florida are hereby appropriated for the establishment of oyster grounds, and to the planting, propagation, cultivation, preservation and distribution of oysters on and from said oyster grounds as provided for in this Act; and all of the proceeds of such sales or leases, when collected or received by the trustees of the Internal Improvement Fund shall be credited to the Oyster Conservation Fund by the Board."

Article 12, section 4, of the Constitution of Florida, reads as follows:

"The State School Fund, the interest of which shall be exclusively applied to the support and maintenance of public free schools, shall be derived from the following sources. The proceeds of all lands that have been or may hereafter be granted to the State by the United States for public school purposes. Donations to the State when the purpose is not specified. Appropriations by the State. The proceeds of escheated property or forfeitures. Twenty-five per cent. of the sales of public lands which are now or may hereafter be owned by the State."

It will be seen that said section 4 of article 12 of the Florida Constitution refers to 25% of the sales of public lands which are now or may hereafter be owned by the state.

Sections 270.12 and 270.13, Florida Statutes, 1941, concern lands which are referred to in said section 4 of article 12 of the Constitution.

Section 4 of said chapter 24121 refers to any and all funds hereafter received or collected by the trustees of the internal improvement fund under the provisions of section 253.45, Florida Statutes, 1941, or any other amendment thereof, for and in respect to the sale of dead shell or for the right or privilege to take shell or shell deposits.

Section 253.45, Florida Statutes, 1941, reads as follows:

"The trustees of the internal improvement fund of the State of Florida may sell or lease any phosphate, earth or clay, sand,



gravel, shell, mineral, metal, timber or water, or any other substance similar to the foregoing, in, on, or under, any of the sovereignty lands of the State of Florida, upon such terms and conditions as may seem most advisable to the said trustees and to the best interest of the State of Florida, the proceeds of such sales or leases to be credited to the trustees of the internal improvement fund."

It will be seen that it has reference to the phosphate, earth, clay, sand, gravel, shell, etc., or any other similar substance in, on or under any of the sovereignty lands of the State of Florida.

In the case of *State v. Holland*, 10 So. 2d. 577, text 590, the court said:

"All the proceeds of the seminary lands, the seat of government lands, the sixteenth sections or school lands and other special grants of lands, if any, go to the specific purposes of the grants. Lands under navigable waters below ordinary high-water mark belong to the State by virtue of its sovereignty for appropriate public uses and are not among the 'public lands' of the State that are referred to in section 4, Article XII, and section 5, Article XVI of the constitution of 1885."

It will be seen that sovereignty lands are not among the public lands of the state referred to in section 4, article 12 of the constitution, and sections 270.12 and 270.13, Florida Statutes, 1941, and, therefore, section 4 of chapter 24121, Laws of Florida, 1947, which has reference to the products and the right to take products from sovereignty lands is not in conflict with the said section 4 of article 12 of the constitution and, therefore, all of the proceeds as mentioned in section 4 of chapter 24121 will go to the "Oyster Conservation Fund."

February 20, 1947.—047-49.

#### TRUSTEES—SCHOOL LANDS—CONTRACT FOR SALE

**QUESTION:** The Trustees of the Internal Improvement Fund have contracted to sell real property; such contracts are outstanding; in view of attorney general's opinion of January 21, 1947 (Re: Taxation of sixteenth section school lands after contract for conveyance but prior to conveyance, which seems to hold that the property so contracted to be sold by the board is taxable), when would the tax lien become enforceable, (a) before title passes out of the state, or (b) after title passes out of the state?

*To Honorable F. C. Elliot, Engineer and Secretary, Trustees of the Internal Improvement Fund:*

It will be seen from a reading of said opinion of January 21, 1947, that it should be held that the rights and interests of the purchasers under such contracts as are made by the trustees are subject to be taxed under the ruling of the Florida Supreme Court in the case of *Bancroft Investment Corporation vs. City of Jacksonville*, 27 So. 2d. 162; that such rights and interests should be taxed in the names of the purchasers although the state's interest is exempt; that under section 270.18, Florida Statutes, 1941, when the property is reinstated in the state, or its agency, the lien of the tax will be inferior to the lien of the state in the property taxed except tax certificates and tax deeds in the hands of a person, private firm or private corporation, which are valid obligations against the land and these may be redeemed and paid for by the state, or its agency.

These taxes can be imposed before title passes out of the state but as heretofore stated the state, or its agency, if the title to such lands under contract is reinstated in the state, or its agency, can redeem the tax certificates and tax deeds in the hands of persons, private firms and private corporations.

In my opinion, the tax lien cannot be enforced against the state's interest in the property so long as the contracts are outstanding; however, the tax might be enforced against the rights and interests of the purchasers in said property before and after the title passes out of the state.

November 12, 1948.—048-337.

#### HOMESTEAD ENTRIES BY VETERANS

**QUESTION:** Where a war veteran has made entry of lands under sections 253.35-1 to 253.35-6, Florida Statutes, and is complying with the requirements of said statutes, is such property subject to taxation by the county and taxing districts wherein it lies for ad valorem taxes?

*To Honorable C. M. Gay, State Comptroller:*

It seems clear from a study of the aforementioned statutes that title to the lands entered as aforesaid do not vest in the veteran until all the requirements of the statutes are set and complied with, including occupancy for a period of three years.

It is a general rule, that where an entryman of public lands has done everything necessary to entitle him to a conveyance, his lands are subject to taxation although such conveyance has not been issued (61 C. J. 362 and 367, sections 348 and 361); however, where such entryman has not completed the prescribed requirements of the statutes so as to entitle him to a conveyance he does not have such title as may be taxed (61 C. J. 363 and 367, sections 349 and 361). (See also 2 Cooley on Taxation 46th Ed. 1280, section 605 and 51 Am. Jur. 288, section 228.)

Under the aforementioned statutes when an entryman has resided upon, asserted dominion over, improved and made the tract of land upon which he has entered, his place of abode for a period of three years, he becomes entitled to a conveyance of the said lands; however, he may not escape taxation by failing to make proper proofs and obtain a conveyance of the lands, said lands being taxable from the time he would be entitled to a conveyance and not from the time he receives one.

An entryman, from the time he completes the prescribed requirements of the statutes until he receives his conveyance, is the holder of an equitable title, which would seem to be a beneficial title in equity within the purview of section 7, article X, of the state constitution, providing for exemption of homesteads from taxation.

From the foregoing authorities it would seem that the question should be answered in the negative, so long as the entryman is not entitled to obtain conveyance from the state or its agency, and that the lands, after the entryman is entitled to conveyance, is subject to taxation unless exempted under the laws for exemption of homesteads from taxation.

#### PUBLIC PROPERTY AND PUBLIC BUILDINGS

April 14, 1948.—048-125.

##### STATE BOARD OF EDUCATION—MARIANNA ARMY AIRFIELD

**QUESTION:** Does the State Board of Education of Florida have legal authority to accept title to certain property, subject to the conditions therein set out, etc.?

*To Honorable Colin English, State Superintendent of Public Instruction:*

I have examined the deed from the United States of America, through the Federal Farm Mortgage Corporation, to the State Board of Education, and copy of resolution, proposed for adoption by the State Board of Education. It is my opinion that the State Board of Education of Florida has

legal authority to accept title to the property therein described and to observe and be bound by the terms, conditions, provisions, covenants and restrictions in the proposed deed, and that the board may lawfully adopt the resolution in the form submitted.

April 1, 1948.—048-111.

ARCHITECTURAL FEES—BOARD OF CONTROL—CONTRACT  
RE-NEGOTIATION

**QUESTION:** The Board of Control entered into a contract, dated October 16, 1946, with a firm of architects to act as associates to the board's architect in the preliminary studies, working drawings and specifications for an administration and classroom building at the University of Florida; the contract provided for a fee of 3.7% of the cost of the building. The agreement contains a provision that if a contract for the construction of the building is delayed for a period of 12 months after completion of the plans the architects shall be paid the sum of \$3,000 as final payment and payment in full under the contract. No contract has been let and 12 months have elapsed. May such provision for the payment of \$3,000 be eliminated by agreement of the Board of Control and the architects?

*To Board of Control, Florida State University:*

I understand that you intend to let contract for the building as soon as funds are available.

The contract required payment of \$5,000 upon completion of preliminary studies and \$14,000 more upon completion of the drawings and specifications, all of which has heretofore been paid to the architect. The remainder of the fee was to be paid after letting of the contract. The paragraph of the contract which it is proposed to eliminate reads as follows:

"If the letting of a construction contract on the work is delayed for a period of 12 months after completion of the plans the architects shall be paid the sum of \$3,000.00 as a final payment on this contract, and the contract shall be deemed terminated and the Architect fully paid."

The architects call attention to the fact that at the time they entered into the contract the estimated cost of construction as set out in the contract with the architects was approximately \$700,000 on which their total fee would be approximately \$26,000, but since that time the cost of construction has greatly increased and the building will now cost approximately \$1,200,000; on the present costs their fee would be between \$44,000 and \$45,000.

The architects now request by agreement that the clause of the contract providing for payment of the additional \$3,000 in full satisfaction be eliminated.

The effect of the proposal is to suggest that, instead of paying \$3,000 which you now owe the architects under the terms of the contract, you pay them approximately \$25,000 whenever the contract may be let, in six months or a year or possibly later.

Upon payment of the \$3,000 the architects will have received everything for which they bargained. If the clause were eliminated you would owe them \$25,000 a little later instead of \$3,000 now. It would not be lawful to do so if you intend to construct the building later. I believe that this analysis of the proposal of the architects will make it clear that it would not be lawful to cancel the paragraph if you intend to construct the building later. The question requires a negative answer.

June 12, 1947.—047-174.

### INSURABLE PROPERTY—LIABILITY FOR LOSS

**QUESTION:** On March 15, 1947, a contractor entered into written contract with the Florida Board of Forestry and Parks (Florida Forest and Park Service), to construct a building for it for the sum of \$5,375.00, to be paid for, as the work progressed, 50%, 25%, and a final 25% upon completion and delivery to the board. There appear to be no provisions in the contract or other papers concerning the relieving of the contractor of liability in event of destruction of the building prior to completion and the contract appears to provide, in effect, for a "lock and key" job. On May 8, 1947, when the building was almost but not quite completed, it was destroyed by fire. Prior to such loss, the board filed with the state treasurer properly prepared forms for insurance of said building in the state fire insurance fund, valuing such property at the contract price. No performance bond as contemplated by section 255.05, Florida Statutes, 1941, was furnished by this contractor to the board. What sum, if any, is payable from the state fire insurance fund to the board in connection with this loss?

*To Honorable J. Edwin Larson, State Treasurer:*

While reference is made to a contract in the foregoing statement, no attempt is made here to give an opinion with respect to validity.

The state fire insurance fund was created for the purpose of insuring therein "insurable property" of the state, at not more than three-fourths its replacement value. (Section 284.01, Florida Statutes, 1941.) It is contemplated that all "newly erected or acquired property" of the state in charge of boards or persons shall be insured in such fund. (Section 284.04, Florida Statutes, 1941.)

Section 255.05, Florida Statutes, 1941, provides, in part, that any person entering into formal contract with the state or other public authority for construction of any public building shall be required, before commencing the work, to "execute the usual penal bond, with good and sufficient sureties," with additional obligations in said bond as in such section set forth.

It would seem that the words "newly erected or acquired property" quoted herein, and as used in said section 284.04, is not to be construed as including property in the course of construction contracted for by the state. The Legislature, in requiring the performance bond described in said section 255.05, has furnished ample protection to the state with respect to any such property or money advanced in pursuance of contract, therefor, prior to completion of such property and acceptance by the state.

In view of the foregoing, in my opinion the question is properly answered as follows:

A public building being constructed under contract for the state is not "insurable property" or "newly erected or acquired property" of the state, insofar as the state fire insurance fund is concerned. Hence, it would seem that no sum is payable to the Florida Board of Forestry and Parks in connection with the loss of this building. If a valid contract now subsists between the board and this contractor, the contractor is required, in pursuance thereof, to erect and deliver to the board the building provided for in the contract. If the contractor refuses to do this, or if the contract is not an enforceable one, the only relief left to the board for the sum hitherto advanced to the contractor, is recovery from the contractor of such amount.



**BOARD OF COMMISSIONERS OF STATE INSTITUTIONS**

June 7, 1948.—048-186.

**AUTHORITY OF BOARD—TRANSFER SURPLUS FUNDS**

**QUESTION:** Does the authority to transfer surplus funds provided for one project under a subhead apply to the projects and subheads listed under section 3 of chapter 23882, as well as the projects and subheads under section 1 of that chapter?

*To Honorable C. M. Gay, State Comptroller:*

In the request for opinion it is pointed out that in section 3 of chapter 23882 under the subhead "Deaf and Blind School" there are listed the following: "Library and Classroom Addition, \$250,750" and "White Primary Unit, \$354,100" along with certain other projects. It is further explained that there is a surplus of \$10,000 in the amount appropriated for the construction of the library and classroom addition, and that such surplus is needed to supplement the fund appropriated for the white primary unit, and the board of commissioners of state institutions wish to transfer same to the latter project.

Section 1 of chapter 23882 appropriates eight million dollars for construction of those buildings and facilities listed in section 1 and can be used for no other projects. However, after making the appropriation for the buildings and facilities under section 1, the section continues as follows:

"... and said Board is hereby authorized and empowered to construct or to contract the construction, in the manner deemed expedient and wise, the buildings and facilities authorized by this Act, and to do and perform all acts and things necessary thereto. The sums hereinafter designated in respect to each subhead are the maximum sums appropriated hereby and to be spent hereunder for the respective institutions or branches listed under such subheads, respectively: Provided, however, that if the expenditures for any fully completed building or facility in a particular subhead are less than the specific amount designated for such building or facility, then the unexpended amount in that behalf may be applied by said Board to supplement the amount designated for any other building or facility included in the same subhead and sub-total. Any balance remaining after the completion of all the items designated in each subhead shall revert to the General Revenue Fund and shall not be subject to transfer to any building, facility, purpose or use incident to any other subhead hereof."

While the first part of the section, that is, the appropriation of the eight million dollars is definitely restricted to the projects listed in section 1 of the chapter, the remainder of the section as quoted refers to the whole act, including section 3, as clearly indicated by the words underscored. There would be the same reasons for permitting transfer of surplus funds from one project within a subhead to another project within that same subhead under section 3 as under section 1.

It is my opinion that the board may lawfully make the transfer. The question is answered in the affirmative.

June 7, 1948.—048-185.

**APPROPRIATION—WARD BUILDINGS—FLORIDA STATE HOSPITAL**

**QUESTION:** In section 1 of chapter 23882, Laws of Florida, 1947, (section 282.24, 2 (c) Cum. Supp.), the Legislature appropriated \$750,000 for two ward buildings at the Florida State Hospital. May the Board of

Commissioners of State Institutions contract for and use that sum for the construction of one ward building at that institution?

*To Honorable C. M. Gay, State Comptroller:*

The origin of the project was in the 1945 building fund act. Under that act there were included for the Florida State Hospital, in group B, a "New White Female Ward Building—equipped, \$233,400.00" and in group C, a "New White Male Ward—equipped, \$233,400.00."

It appears that notwithstanding certain efforts made to construct one or two ward buildings under the 1945 building fund act, they did not get beyond the planning stage. In 1947, the Legislature enacted chapter 23882 in which it brought forward and included in the new bill the unaccomplished projects of the 1945 building fund act and in so doing set them up in the bill as originally introduced in the house thus: "White Male and Female Ward Buildings, \$750,000.00." In the final draft of the bill they were listed, "2 Ward Buildings, \$750,000."

The figure of \$750,000 submitted to the 1947 Legislature as the estimated cost of the two buildings, and which I understand to have been a hurried estimate, was grossly inadequate for the construction of the two ward buildings contemplated. Indeed, it appears that the Florida State Improvement Commission had no doubt about the intention of the Legislature, for it requested bids for two ward buildings—one for males and one for females—all in accord with the projects carried over from the 1945 act.

It is frankly stated that it would have been possible to have constructed two usable ward buildings within this appropriation, but to have done so would have sacrificed approximately 20% of the bed capacity possible in one building. It is not a question of building one ward equivalent in bed space to two smaller ward buildings; the proposal is to build one ward building of approximately the same bed capacity as was intended for each of the two ward buildings when set up in the 1947 act.

One of the purposes of the 1947 building fund act was to withdraw some of the broader powers granted to the board under the 1945 building fund act. Under the 1947 act, section 1, authority is restricted to the exact projects set up in the act and to the amount appropriated therefor, the only exception being permission to use any surplus after the completion of a particular building for other projects under the same sub-head.

Considering the history of the project, it is clear that the Legislature carried forward into the 1947 building fund act two wards and intended to build two wards, but the cost as given to the Legislature was greatly underestimated for the buildings which were contemplated. There is nothing in the act to indicate a legislative intent to build one ward building at a cost of \$750,000; the Legislature appropriated that amount for two ward buildings.

There is no authority, except in the Legislature, to allocate the whole appropriation to one ward building.

The question requires a negative answer.

November 19, 1947.—047-383.

#### TIMBER SALE—INCLUSION OF PULPWOOD—INTENTION OF BOARD

QUESTION: Does the wording "marketable timber" used in the instrument whereby the Board of Commissioners of State Institutions sold to Panama City Lumber Company timber on certain of the Florida State Hospital lands for the principal sum of \$92,000, include timber suitable for pulpwood growing on said lands?

*To Honorable J. E. Straughn, Secretary, Board of Commissioners of State Institutions:*

The instrument mentioned provides that the board granted, bargained, sold, transferred and conveyed thereby to said lumber company "all the marketable timber, standing, growing or down, located upon" the real property described in said instrument.

The words "timber" or "marketable (or merchantable) timber," when used in a contract of this nature, are susceptible of further explanation. If their more definite meaning can be gathered from other provisions of the contract it is the general rule that such meaning prevails. For example (and a case quite analogous), see *Houlton, et al. vs. Molton, et al.* (Ala.), 11 So. 2d. 850. On the other hand, if the contract contains no other qualifying provisions, the more exact meaning of such quoted terms may be ascertained from an inquiry into the intentions of the parties and the circumstances surrounding the transaction.

There was a day when the use of timber was limited to its use in the construction of buildings and vessels; and then "timber" meant wood squared or capable of being squared for use for such construction purposes. With the passage of time, the many uses to which wood from all kinds of trees has come to be used commercially has effected a change in definition, so that now "timber" is accepted as that sort of wood proper for building purposes or in the manufacture and construction of useful articles. Thus, when the words "marketable timber" are used in a contract of sale without further qualification therein, the fact that in the vicinity where the timber is located there exists a market for pulpwood would seem to indicate the intention that trees of the size suitable for such purpose are covered by said words. In support of one or more of the foregoing statements in this paragraph, see *Nettles vs. Lichtman* (Ala.), 152 So. 450; *Great Southern Lumber Co. vs. Newsom Brothers* (Miss.), 91 So. 864; *Kerl vs. Smith* (Miss.), 51 So. 3; *U. S. vs. Stores* (C. C.), 14 F. 824; *U. S. vs. Soto* (Ariz.), 64 P. 419.

Section 5 of the aforesaid agreement of sale refers to the location of saw mills upon the land "in the vicinity of the timber to be cut for the manufacture by purchasers of said timber into lumber." Section 10 states, among other things, that a "10% cruise of said timber shows an estimated total of 9,206,000 board feet thereof, more or less,"—and such estimate did not include pulpwood.

Despite the implications of the qualifying terms in the preceding paragraph, it is considered that in a transaction of this nature between the state and a purchaser, the technical possibilities presented by such terms should yield to the intentions of the parties if conflict between the two exists.

In connection with the preparation of the contract of sale in this office, from statements made by representatives of Panama City Lumber Company, it was apparent that they were under the impression that the pulpwood located on said tract was included in the sale to them.

A representative or representatives of the State Board of Forestry and Parks cruised the timber, in pursuance of request of this board, as evidenced by the minutes of August 13, 1946; and the estimate of 9,206,000 board feet was their estimate. In their report of such cruise to this board, they stated, in effect, that because of the comparative scarcity and location of trees suitable for pulpwood on the land involved, it would not be practicable or profitable to attempt to effect an independent sale thereof, and it was suggested that such should be thrown in with the other timber when sale of that was affected.

In view of the foregoing, in my opinion the question is properly answered as follows:

(1) The wording of the contract here involved furnishes cogen but not necessarily conclusive argument that a technical construction thereof would exclude pulpwood under its coverage.

(2) In the absence of the board's attempting any sale of the pulpwood on the land involved, and in view of the suggestion of the representative of the forestry department mentioned, it may be reasonably assumed that it was the intention of the board to accede to such suggestion and to include pulpwood located upon said land in the sale. However, that is a question of fact which only the board can answer; and it is suggested that the matter be called to the board's attention for their answer. If that was the intention of the members of the board, then obviously the contract should be construed as including the trees suitable for pulpwood on said land.



## CHAPTER XVII

### PUBLIC BUSINESS

#### MISCELLANEOUS APPROPRIATION

June 30, 1947.—047-173.

##### FORESTRY BOARD—RELEASE OF APPROPRIATION

**QUESTION:** Has the Budget Commission authority to release to the State Board of Forestry \$6,250 from the emergency appropriation made to that board by item 20 (c) of chapter 22827, the general appropriation act of 1945, where the amount requested represents obligations incurred during the current year, the appropriations for salaries and expenses of the board having been exhausted?

*To Honorable Homer G. Graham, Budget Director:*

The Florida Board of Forestry and Parks has submitted to the Budget Commission a request for release of \$6,250 from item 20 (c) of the general appropriation act of 1945. The board explains that it did not realize as much from receipts as it had expected, leaving the board short of \$6,250 for payment of necessary and regular expenses. The items making up the amount requested appear to be usual, routine operating expenses.

The 1945 appropriation act, item 20, appropriated \$100,000 for salaries, \$275,000 for expenses, and "Emergency—not to be used without approval of the budget commission, \$225,000." The question is whether this over-expenditure of the item for expenses may be paid from the \$225,000 emergency appropriation made in item 20 (c).

It appears that in 1945 the budget commission reduced the board's requested appropriation by \$225,000 and the Legislature inserted the amount disapproved by the Budget Commission but as an emergency appropriation to be used only with the approval of the Budget Commission.

It is my opinion that the Budget Commission has authority to release from the \$225,000 emergency appropriation all or any part of the amount requested, if the Budget Commission is satisfied that the obligations were necessary for the efficient operation of the agency.

This is the last day of the biennium and if a release is to be made it must be made by the budget commission and the comptroller notified of such release today—otherwise all of the emergency item will revert at midnight and will not be available for release thereafter.

Attention is also called to section 8 of chapter 22827 which will require the Florida Board of Forestry and Parks to file with the comptroller a copy of its certification of the amount contracted to be expended, showing in detail to whom obligated and amount of such obligation, etc. This also must be done today in order that released funds may be available for disbursement later.

August 29, 1947.—047-290.

##### RELIEF PAYMENT—METHOD—SOURCE OF RELIEF MONEY

**QUESTIONS:** (Under Chapter 24181, Laws of 1947, which was a relief act, reading in part: "That the State Road Department of the State of Florida be and it is hereby authorized, directed and required forthwith to draw its warrant upon the state treasurer of the State of Florida in the sum of \$1,500, payable to P. D. Shuping of Sharpes, Brevard county, Florida, in amounts of \$50.00 per month for the next thirty months and

payable from any funds in the state treasury of the state of Florida not otherwise appropriated and to deliver said warrants to said P. D. Shuping.")

1. Should the payment be made in a lump sum of \$1,500 or in thirty monthly payments of \$50.00 each?

2. Are the payments to be made from the general revenue fund or from the state road fund?

*To Honorable F. Elgin Bayless, Chairman, State Road Department:*

While there appears to be a conflict in the quoted section of the act as to the method of payment, it is my opinion that the Legislature intended this money to be paid in thirty monthly instalments of \$50.00 each rather than in a lump sum of \$1,500.

A review of relief acts predicated on alleged negligence or other liability of the State Road Department passed at several recent sessions of the Legislature shows that most, but not all, have been made payable from funds of the State Road Department. In this case, the provision for payment is in language customarily used in connection with appropriations payable from general revenue, and there appears to be nothing in chapter 24181 indicating a legislative intent that this money be paid from state road funds. The rule is that appropriations which are not specifically made payable out of a special or particular fund are payable only from the general fund. It is my opinion that the money payable under this act is to be paid from the general revenue fund.

## PUBLIC PRINTING

July 24, 1947.—047-221.

### STATE DOCUMENTS—DISTRIBUTION—SCHOOL BOOKS

**QUESTIONS:** 1. Are the phrases "public documents" and "state documents" as used in sections 283.22 and 283.23, Florida Statutes, 1941, broad enough to include all publications of the governmental departments and agencies? For example, should study guides in elementary arithmetic or secondary school agriculture be classified as public documents and be mailed to the "depositories of public documents"? Or, should public documents be construed as limited to reports, laws, regulations and other matters of official pronouncements?

2. Would the book, "FLORIDA: WEALTH OR WASTE?" which has been designed as a junior high school text on the state's resources be considered a public document within the purview and meaning of the law?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 283.22 provides for distribution of public documents and state documents published by the state to the general library of the University of Florida and the Florida State College for Women, makes the two institutions depositories for said documents, and imposes certain duties on them with reference to the care and further distribution of such documents.

Section 283.23 names the University of Miami, Stetson University, and University of Tampa as state depositories for public documents and entitles them to receipt of a certain number of copies of all reports of state officials, departments and institutions and all other state documents published by the state and imposes certain duties on the institutions in regard to the care and use of such documents.

It would be very difficult indeed, if not impossible, to define the phrases "public documents" and "state documents" as used in those sections of the statutes with any great degree of exactness. In general, the phrases cover annual or biennial reports of state agencies, boards and institutions, their studies and surveys, or other valuable data and information assembled by them as a part of their official functions.

Study guides in elementary arithmetic or secondary school agriculture would not, in my opinion, be included in "public documents" or "state documents" as used in the foregoing sections of the statutes.

I have no doubt whatever that the book "Florida: Wealth or Waste?" which I have examined with much interest, would be a welcome addition to any library as a book of general information, as well as for reference; assembling, as it does, in easy and simple form, a great mass of information about this state and its resources. It is my opinion that a text book for use in the schools would not be included in the meaning of the phrases "public documents" or "state documents" as used in sections 283.22 and 283.23.

October 25, 1948.—048-332.

#### BOOKBINDING—STATE BOARD OF HEALTH

QUESTION: Do sections 283.03 and 283.21, Florida Statutes, 1941, apply to the binding of library books, journals, pamphlets and other publications so as to require that such work for the Florida State Board of Health be done in the State of Florida?

*To Florida State Board of Health, P. O. Box 210, Jacksonville, Florida:*

Said section 283.03 requires that "all the public printing of this state shall be done in the state." Said section 283.21 provides that "the controller shall purchase from parties in this state manufacturing same, all the blank books, stationery, and paper to be used in the different departments. . . ."

Book binding does not seem to be within the usual legal definition of "printing" (see 33 Words and Phrases 633 et seq.). The binding of library books, journals, pamphlets and other publications does not appear to be blank books, stationery or paper within the purview of section 283.21 aforementioned.

The question as to whether a job is to be classified as "printing" under section 283.03, Florida Statutes, 1941, or as bookbinding, is determined by whether or not such job is primarily a printing or a bookbinding job. If printing is merely incidental and not a part of the main job, it should not be classified as a printing job.

It, therefore, appears that the question should be answered in the negative when applied to book binding so long as there is no printing in connection therewith, or the printing is merely an incident to the book-binding work.

#### STATE FIRE INSURANCE FUND

October 2, 1947.—047-328.

#### INSURABLE PROPERTY—OPERATION OF ESTOPPEL—STATE BUILDINGS

QUESTION: In the light of additional facts, is certain property of the Florida Board of Forestry insured and covered by the state fire insurance fund, regardless of opinion No. 047-174?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

"The State Board of Forestry did advise Mr. Carl B. Davis that this construction was contemplated, and asked if the Fire Fund would write a Builders Risk on the same; Mr. Davis replied in the affirmative. Mr. Davis also said that the full amount of the coverage should be written for a completed structure; this being the better practice as it would take care of the structure as it progressed, as well as the materials on the ground.

Further inquiry was made by the Forestry Department if such buildings were covered, and Mr. Davis answered again in the affirmative."

Facts such as these might constitute estoppel to deny liability if private parties were involved. However, there are involved here two departments of the state, and it would seem that estoppel could not properly be invoked here. The question involved in such opinion is purely one of law.

I have carefully reconsidered the question dealt with in the aforementioned opinion. The additional facts in the foregoing quotation are not, in my judgment, of such nature as to afford legal reason for changing the conclusion set forth in such opinion.

October 14, 1947.—047-350.

#### STATE PROPERTY—VALUATION OF STATE BUILDINGS

**QUESTION:** What is the proper basis of valuation of state-owned buildings of the Florida Board of Forestry and Parks for the purpose of insurance in the state fire insurance fund?

*To Honorable Lewis G. Scoggin, Park Director, Florida Board of Forestry and Parks:*

The request for opinion mentions such buildings of said board acquired in various ways, viz: by construction by the board, by transfer to the state by the Civilian Conservation Corps, by acquisition from the War Assets Administration at a percentage of salvage value, and by donation. The request for opinion does not mention the use to which these properties are put in relation to the lawful function of the board, but a helpful determination of the question requires that cognizance be taken of the possible types of such state-owned buildings described hereinafter in the answer to the question. It is here stated that with respect to a building which the board has acquired by construction or purchase at market value, cost thereof may be a relevant factor in determining its insurable value; otherwise, the cost, if any, incurred by the state in its acquisition of a building has no relationship to insurable value in the state fire insurance fund.

Property of the state is required to be insured in said fund at not more than "three-fourths of its replacement value." (Section 284.01, Florida Statutes, 1941.)

It seems apparent that the primary purpose of the state fire insurance fund is to assure, to the extent of coverage permitted by the law, the replacement of state-owned property used and occupied for state purposes. The purpose of the fund is not to indemnify by the payment of damage for loss sustained, but to assure replacement in the event of loss; and such purpose is further apparent from the provisions of sections 255.01 and 255.03, Florida Statutes, 1941, the effect of which is to appropriate insurance proceeds paid in the event of partial or total destruction for repair or replacement in the state property where loss has occurred. It would seem, therefore, that in determining replacement value of a building insured in said fund, its "use value" to the State must be considered.

In view of the foregoing, in my opinion the question is properly answered as follows:

(1) The "replacement value," within the meaning of section 284.01, of a state-owned building that is used by the board in the necessary and proper performance of its lawful powers, functions and duties, is that amount, not in excess of the amount necessary to replace said building, which would be required to construct a building, in event of loss of the insured building, of the type and character reasonably necessary and appropriate for the use to which the insured building may have been put by the board. It is assumed that if the board constructed or acquired at market value a building, cost thereof would be commensurate with the use



intended. However, if otherwise, the board acquired a building, the replacement value thereof would not be the actual cost of replacement in the event of loss if a building of less value normally, appropriately and reasonably would serve the purpose to which the insured building had been or might be put by the board in the discharge of its lawful powers, functions and duties.

(2) With respect to a state-owned building located upon real property of the state under the proper and lawful supervision and control of the board, but which building is not of use to the board in the discharge of its lawful powers, functions and duties, the "replacement value," within the meaning of said section 284.01, is the salvage value thereof.

(3) The "replacement value," within the meaning of said section 284.01, of a building acquired by the state for the use of the board upon real property which, because of its nature and character, properly, is not related to the lawfully prescribed powers, functions and duties of the board, would depend upon the circumstances of its acquisition. It would seem that acquisition of such type of property would result from donation. The replacement value of such a building donated to the state for the benefit of the board would be the difference in value of the real property in the event of loss or damage. The "use value" of such a property to the board would be the proceeds which might be derived from sale thereof in pursuance of permissive legislation, or its value as a rental property. Were such a property donated with restrictions as to use or disposition, the replacement or use value to the state would depend upon the nature of such restrictions. It is pointed out that heretofore this office held that when state-owned property is leased under such circumstances as to materially divest the state of control thereof, it is not property which may be insured in the state fire insurance fund. (See opinions numbered 045-62 and 045-175 found, respectively, at pages 470 and 658, Biennial Report of Attorney General, 1945-1946.)

(4) As already noted, state property properly insurable in said fund, shall be insured therein at not more than three-fourths its replacement value.

## CHAPTER XVIII

### PENSIONS AND WAR VETERANS

#### SERVICE OFFICERS

August 21, 1947.—047-269.

##### STATE VETERANS' COMMISSION—TITLE OF MEMBER— AUTHORITY OF NEW DEPARTMENT

QUESTIONS: 1. Under chapter 292, Florida Statutes, 1941, as amended by chapter 22695, acts of 1945, and chapter 24069, acts of 1947, what is the title of the members of the former state veterans' commission?

2. Does the present Department of Veterans' Affairs have the authority to designate the state service officer as director, department of veterans' affairs, with subordinate deputy directors instead of assistant state service officers?

*To Mr. David L. Wiley, State Service Officer, Regional Office Veterans' Administration, Pass-A-Grille Beach, Florida:*

In answer to the first question, I am of the opinion that the title of such members is simply "Member, Department of Veterans' Affairs." This is based on the fact that prior to the 1947 act the members had no title other than member of state veterans' commission, and the 1947 act, so far as is pertinent to this question, did nothing more than change the name of the commission to "Department of Veterans' Affairs."

As to the second question, I am of the opinion that it should be answered in the negative inasmuch as sections 292.06 and 292.07 of 1945 Cumulative Supplement to Florida Statutes, 1941, which provide for employment of a state service officer and employment of assistant state service officers, were in no way changed or affected by the passage of chapter 24069, acts of 1947, except that the State Veterans' Commission was given the name of "Department of Veterans' Affairs."

March 25, 1947.—047-97.

##### STATE AGENCY—LIABILITY FOR TORTS

QUESTION: Is the Florida State Veterans' Commission liable for the damages and injuries caused by its employees' negligent operation of motor vehicles, owned by the commission while in the discharge of their official duties?

*To Mr. David L. Wiley, Executive Secretary, State Veterans Commission, State Service Office, Pass-A-Grille Beach, Florida:*

The Florida Veterans' Commission is a state agency having been created by chapter 22695, Laws of Florida, 1945. The state cannot be sued without its consent and a suit against a state agency is a suit against the state, if the effect of the judgment against the agency would be to impose a liability upon the state. (*Hampton v. State Board of Education*, 105 So. 323; *Kennard v. State Tuberculosis Board*, 176 So. 872.)

"The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is not liable for injuries arising from the negligent or other tortuous acts or conduct of any of its officers, agents, or servants, committed in the performance of their duties." (49 Am. Jur. Section 76, Page 288.)

"The rule of nonliability of the state for the torts of its officers, agents, and servants applies not only to the state itself, but to those agencies through which the state acts in the administration of this government." (52 Am. Jur. Section 100, Page 441.)

"If a state cannot be sued without its consent, and a county is not liable in tort for damages, the law certainly does not authorize an action in tort for damages against the board, a state agency, in the absence of a valid statute permitting it that accords with Section 22, Article III, Constitution." (Arundel Corp. v. Griffin, 103 So. 422, 89 Fla. 128.)

The Legislature has not provided that said commission shall be responsible for such torts, and therefore, in view of the holding of the foregoing authorities, my answer to the question is negative.

September 16, 1948.—048-301.

DEPARTMENT OF VETERANS' AFFAIRS—SALARIES—  
CONSULTANTS

QUESTIONS: 1. Is the Department of Veterans' Affairs authorized under the provisions of chapter 292, Florida Statutes, 1941, as amended, to employ certain technical and medical consultants at salaries exceeding those presently authorized to be paid to the existing personnel?

2. Is the Department of Veterans' Affairs authorized to pay salaries in excess of \$3,600.00 per year to the assistant state service officers?

*To Mr. David L. Wiley, State Service Officer, Regional Office Veterans' Administration, Pass-A-Grille Beach, Florida:*

I have carefully considered all of the provisions of chapter 292, Florida Statutes, 1941, as amended; and, in my opinion, both of the questions must be answered in the negative.

(1) The Legislature, in section 292.06, specifically directs the State Veterans' Commission to employ a state service officer to serve under the direction of the commission in carrying out the objects and purposes of the law; and, in section 292.07, the commission is authorized to appoint "such number of assistants to the state service officer as may be necessary, in the discretion of the commission, to carry out the purposes of this law . . ."

It is my opinion that the Legislature, by virtue of these specific provisions, has impliedly prohibited the employment by the commission of "consultants" or "advisers" except in the role of "assistants to the state service officer." It follows therefore, that such technical and medical consultants could not be paid a salary in excess of that presently authorized to be paid to the assistant state service officers.

(2) It is my opinion that the department has no authority to increase the salaries of the assistant state service officers, so that such salaries would be in excess of \$3,600.00 per year.

The Legislature has specifically provided, in section 292.07 (section 4 of chapter 22695, Laws of 1945), that

"(1) There shall be . . . such number of assistant state service officers as may be necessary as aforesaid, at a salary not to exceed the sum of three thousand six hundred dollars per annum each . . ."

The Legislature has not, in any way, evidenced an intent that such salaries could be increased beyond that amount. It seems, therefore, that the assistant state service officers will have to wait until the next session of the Legislature to obtain relief.

## LAWS RELATING TO VETERANS, GENERALLY

March 10, 1948.—048-86.

## MERIT SYSTEM—VETERANS' PREFERENCE—EXAMINATIONS

QUESTION: Under what circumstances and how often is a veteran entitled to the preference credits authorized by sections 2 and 3 of chapter 24201, Laws of Florida, 1947, (sections 295.08 and 295.09, cum. supp.)?

*To Honorable Angus Laird, Merit System Advisor, P. O. Box 1136, Tallahassee, Florida:*

Section 2 of chapter 24201 of the Laws of Florida, 1947 (sections 295.08, cum. supp.), in part reads as follows:

"In all examinations to determine the qualification for entrance into the service of all establishments, agencies, boards, commissions, political sub-divisions, and municipalities of the State of Florida where the employment of persons is subject to the merit system, civil service, or other competitive system, ten points shall be added to the earned ratings of those persons included under section 1 (1, 2 and 3), and five points shall be added to the earned ratings of those persons included under section 1 (4) of this act, provided, that such points shall be added only to earned ratings which are equal to or greater than the minimum rating for qualification as announced by the establishment, agency, board, commission, political subdivision or municipality of the State of Florida controlling the particular examination."

Section 3 of that chapter (section 295.09, cum. supp.), provides that when an honorably discharged veteran shall have been reinstated in his former position with any of such public agencies, upon his first examination to determine his qualifications for promotion ten points shall be added to the earned rating of the veteran described in section 1 (1, 2 and 3), and five points to the earned rating of the veteran described in section 1 (4) of chapter 24201 (section 295.07, cum. supp.).

The key to the problem seems to be the meaning of the word, "entrance," in section 2 quoted, supra. The word does not mean entrance into actual service or the taking of a position. As used in that section, it means the entering of the veterans' name on any register or other official list of eligibles for which he has qualified himself by passing the required examination. This must be so because the veteran gets the credit when he passes the examination; he may not be employed for a long time after his name is placed on the register.

It is my opinion, therefore, that section 2 of the chapter gives to a veteran preference credits every time he passes an open competitive examination for a classified position in any of the agencies mentioned in section 2 of the act. I understand that a similar interpretation is given to the federal act (the veteran's preference act of 1944) by the United States Civil Service.

With reference to promotional competitive examinations, section 3 of the chapter expressly provides that credits shall be allowed in this type of examination to a reinstated veteran on his first examination. The fact that the credits are given only to a reinstated veteran, and only on his first examination for promotion, clearly indicates that it was not intended to give the credits upon any other examination to determine a veteran's qualifications for promotion because, if the credits were allowable generally on promotional competitive examinations, there would be no reason for section 3 of the chapter.

As used herein, open competitive examination means an examination open to anyone, whereas, a promotional competitive examination is restricted to those holding positions in the agencies.



Summarizing—section 3 gives a reinstated veteran his preference credit on his first promotional examination; and section 2 gives to all veterans described in the act their preference credits every time they pass an open competitive examination for employment by the agencies named in the statute.

## CHAPTER XIX

### MOTOR VEHICLES

#### TRAFFIC ON HIGHWAYS

March 29, 1948.—048-108.

##### ACCIDENT—REMOVAL OF VEHICLE—INVESTIGATION

**QUESTION:** What legal action may be prosecuted against the owner or operator of a repair garage who removes a wrecked motor vehicle from the scene of an accident before an investigating officer has opportunity to arrive at the scene for proper investigation?

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

There is no state statute governing or regulating the removal by the owner or operator of a repair garage of a wrecked motor vehicle, which has been involved in a highway accident, before opportunity for an authorized investigating officer to reach the scene of the accident for the purpose of making investigation. The duty to make report upon highway accidents to investigating officers, and to notify a law enforcement officer of the circumstances surrounding such accident, is imposed upon the driver, or the person in charge of the operation of the vehicle which is involved, but these provisions of the statute do not extend to persons other than those in charge of the operation of the motor vehicle.

July 29, 1947.—047-232.

##### BEACH TRAFFIC—REGULATIONS—PATROLMEN

**QUESTIONS:** (The Board of County Commissioners of St. Johns County is confronted with the problem of reckless driving, speeding, etc., on the beaches.)

1. Under chapter 21543, acts of 1941, pertaining to speed limit, is said board directed and authorized to place patrolmen on the beach to enforce the law and pay for such service from fine and forfeiture fund or,

2. Is the sheriff charged with the duty of enforcement of regulation as fixed by said board?

*To Honorable Hiram Faver, Clerk, Board of County Commissioners, St. Johns County, St. Augustine, Florida:*

Section 1 of chapter 21543, acts of 1941, reads as follows:

"That the beach of the Atlantic Ocean between high and low watermark, within the confines of St. Johns county, Florida, except that part of said beach within the corporate limits of the City of St. Augustine, be and the same is hereby made and declared a public highway and within the limitations herein prescribed subject to the laws of the state with reference to highways, but subject to any right of the public to use said beach for bathing and recreation. That as such highway said beach shall be under the jurisdiction, supervision, regulation and control of the board of county commissions of St. Johns county, Florida, with power on the part of said board to cause obstructions to be removed from said beach and to restrain and regulate the use and occupation of the same for the protection of the public and of life and property. Provided, however, that nothing in this act shall be construed as prohibiting the use of said beach for flying machines."

It is stated that the Board of County Commissioners has promulgated a rule fixing the speed limit on the beach. Granting, but not deciding, that the Legislature gave this authority to the board, it has no power to enforce criminal sanctions for the violation thereof as the act does not give such power to the board. An administrative board may not impose penalties for violation of its rules and regulations which constitute criminal sanctions; only the Legislature may impose such sanctions. (*State v. ACL R. Co.*, 56 Fla. 617, 47 So. 969; *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789; *United States v. Grimaud*, 220 U. S. 506, 55 L. Ed. 563; 42 Am. Jur. 355, Sec. 50.)

Chapter 10486, special acts of 1925, is a law applying to the Atlantic and Jacksonville beaches and is similar to chapter 21543, acts of 1941, the chapter in question.

In the case of *Sallas v. State*, 124 So. 27, 28, the Florida Supreme Court said:

"This court takes judicial cognizance of the provisions of Chapter 10486, Special Acts of 1925, Laws of Florida, making Atlantic and Jacksonville Beaches public highways, and all the provisions of law relating to public highways applicable thereto." The law of this state says:

"Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving." (Section 317.21, Florida Statutes, 1941, also, section 317.22, Florida Statutes, 1941.)

The sheriff is primarily responsible for the enforcement of the laws. Inasmuch as the Legislature has made the beach of the Atlantic Ocean a public highway, it is the sheriff's duty to see that the laws are enforced thereon to the same extent as he is required to enforce the laws on other highways in his county.

In my opinion, the members of the Florida Highway Patrol, also, are given power and authority as is the sheriff to enforce the laws on this said public highway. (See section 321.05, Florida Statutes, 1941, as amended by chapter 23724, acts of 1947.)

I know of no law giving the Board of County Commissioners the authority to hire and to pay for the services of a patrolman for this beach.

April 23, 1948.—048-136.

#### AUTOMOBILE TRAILERS

**QUESTION:** Are persons permitted by Laws of Florida to occupy automobile trailers while being operated along the highways?

*To Captain J. Wallace Smith, Executive Officer, Department of Public Safety:*

The occupancy by persons of automobile trailers while the same are being operated along the highways is not regulated by statute in the State of Florida, the practice being neither permitted nor prohibited.

March 17, 1948.—048-98.

#### BRAKES—POLE TRAILERS—HALF TRACK TRUCKS

**QUESTIONS:** 1. Will a half-track truck with the half-track mounted on solid rubber cleats be allowed to operate over Florida highways? These half-track trucks are to be used for hauling pulp wood in Florida.

2. Will a two-wheel pole trailer as used for hauling logs from the woods to sawmills be required to have brakes on this two-wheel trailer? This trailer is an extended job connected to the truck only by an iron pipe or pole, but exceeds three thousand pounds in weight.

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

Section 320.11, Florida Statutes, 1941, authorizes the use upon the public highways of vehicles equipped with solid tires and airless cushion tires made of rubber and prescribes the license fee to be imposed upon their use. There being no definition or classification within the provisions of the statute of "half-track truck" upon solid rubber cleats, it is assumed that such equipment would fall within the classification set forth in the quoted section and that the use of such equipment is authorized where the vehicles are regularly licensed. Question one is accordingly answered in the affirmative.

Section 317.61, Florida Statutes, 1941, regulates the use of trailers or semi-trailers operated upon the highways and prescribes the weight of such vehicle which may be operated without being equipped with independent brake devices. Paragraph 3 of the quoted section prohibits the operation upon the highways of a trailer or semi-trailer of a gross weight of 3000 pounds or more, except when such trailer is equipped with brakes adequate to control the movement thereof and to stop and hold such vehicle. This paragraph also requires that brakes upon the trailer shall be so designed as to be capable of being applied by the driver of the towing vehicle from the cab thereof, and further requires that the brakes be of such construction that in the event of accidental breakaway of the towing vehicle, the brakes shall be automatically applied. Pole trailer is defined by paragraph 17, section 317.01, Florida Statutes, 1941. Nothing appears in the statutes governing the operation of motor vehicles upon the highways to indicate intention that the pole trailers shall be excepted from the provisions of section 317.61.

The second question is accordingly answered in the affirmative.

April 26, 1948.—048-168.

#### HALF-TRACK TRUCKS—WEIGHT—RUBBER TIRES

QUESTIONS: 1. "Does section 320.40, paragraph 5, apply to half-track trucks with the half-track mounted on solid rubber cleats for operation over public highways of the State of Florida?"

2. "What is the gross allowable weight for this type truck without a Florida maintenance tag?"

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

On March 17, 1948, opinion was rendered wherein half-track trucks with the half-track mounted on solid rubber cleats, were held to be classified under the motor vehicle laws of Florida as "vehicles equipped with solid tires."

The first question is answered in the affirmative.

Solid tires are defined by section 320.01 (8) as

"Solid tires include all tires of any material or substance which do not depend upon confined air for the support of the load except airless cushion tires."

Airless cushion tires are defined by section 320.11 as

"Tires with holes running through a rubber tire from side to side near rim with blocks of rubber between holes."

The cited section further provides that such tires when used on trucks of more than one ton capacity shall be classified as solid tires.

Section 320.40 (5) Florida Statutes, 1941, provides that no motor vehicles equipped with solid tires shall be operated upon a public highway outside the limits of a municipal corporation carrying a load of more than 8000 pounds, including the weight of the motor vehicles. The statute con-



tains no exception to this provision. The load weight permitted to be hauled by vehicles equipped with pneumatic tires having contact with the road is not applicable to vehicles equipped with solid rubber tires or solid rubber cleats. The construction of the several statutory provisions governing the question presented leads to the conclusion that the maximum load permitted to be hauled over the highways by vehicles equipped with solid tires or solid rubber cleats, with or without a Florida maintenance tag, is 8000 pounds including the weight of the vehicle.

October 17, 1947.—047-331.

#### COUNTY VEHICLES—PUBLIC LIABILITY—EXEMPTION FROM LIABILITY

QUESTIONS: 1. Is a county or a member of the Board of County Commissioners or a county employee, individually, responsible for damage occasioned by the negligent operation of a county-owned motor vehicle operated by a county employee for a county governmental purpose?

2. Is it necessary that a county or a county employee comply with the 1947 public liability insurance law, governing the operation of automobiles in the event of an accident caused by a county-owned motor vehicle driven by a county employee for a county purpose, to prevent the revocation of his license?

*To Honorable Charles W. Luther, Attorney for the Board of County Commissioners, Volusia County, DeLand, Florida:*

In answer to the first question, a county is not liable in tort for damages though it has the express power to sue and be sued in the name of the county. (*Keggin v. Hillsborough County*, 71 So. 372; *Arundal Corporation v. Griffin*, 103 So. 422; *Ray v. Marion County*, 71 Fed. 2d. 509, 510; *Henry Aaron v. County of Palm Beach* (not yet reported; opinion filed October 14, 1947).)

The county commissioner may be individually liable for damages occasioned by the negligent operation of a county-owned motor vehicle being operated by him for a county purpose, for it is the general proposition of law "that the relation of employer and employee does not exempt the employee from liability for an injury to a third person resulting from his negligent conduct while acting for his employer; he is liable for any injuries which may be said to be the proximate result of failure to use due care. An employee is not relieved from liability for his own negligence merely because he was acting under the direction of his master at the time of his negligent act or omission. As in any case wherein liability on the part of the individual is predictable of negligence, liability of an employee to a third person, where there is a master and servant relationship, is based upon the common-law duty resting upon every person to use due care and proper precaution so that he does not act or use that which he controls so as to negligently injure another person. In other words, responsibility on the part of the employee is established by proof that he ought to have known or foreseen that the injury or damage would be the result of his conduct, the implication being that having been able to anticipate the injurious occurrence, he could have and ought to have prevented it from happening." (35 Am. Jur., Master and Servant, Section 587, pages 1024-5.)

The same law will apply to a county employee, when damages are occasioned by the negligent operation of a county motor vehicle being operated by him for a county purpose.

The mere fact, therefore, that the master is a county and is not liable in tort would not of itself render the agent (county commissioner or employee), exempt from liability.

As to the second question, the 1947 public liability statute is chapter 23626, Laws of 1947, and section 7 thereof, paragraph (e) says that section 4 of said act would not apply "to any motor vehicle owned by . . . this state (or) any political subdivision of this state."

Inasmuch as this exception refers to "any motor vehicle owned by the state or any political subdivision of this state" (which will include counties of the state), the employee of the county will also be exempt from the provisions of section 4 of the said act in the event of any accident caused by a county-owned motor vehicle driven by such employee for a county purpose.

### HIGHWAY PATROL

June 21, 1948.—048-218.

#### DISPOSITION OF ARRESTED DEFENDANT—SHERIFF'S FEES

QUESTIONS: 1. Does a Highway Patrol officer have the authority to release a defendant arrested by him on the defendant's own recognizance (defendant's promise), to appear before the proper tribunal to answer the charge for which he has been arrested?

2. If the answer to question 1 is "Yes," then what fees would the sheriff be entitled to on said case if the patrol officer signs the affidavit for the warrant in the proper court and the sheriff has nothing to do on said case?

3. Does a highway patrol officer have the right, after making an arrest, to carry the defendant forthwith before the judge of the court having jurisdiction of the charge for immediate disposition?

4. If the answer to question 3 is "yes," is the sheriff entitled to any fees regarding the disposition of the case?

*To Honorable Fred Mills, Justice of the Peace, 4th District, Volusia County, DeLand, Florida:*

Section 321.05 (4), Florida Statutes 1941, as amended, reads in part as follows:

" . . . In all cases of arrest by patrol officers the person arrested shall be delivered forthwith by said officer to the sheriff of the county or he shall obtain from such person arrested a recognizance or, if deemed necessary a cash bond or other sufficient security conditioned for his appearance before the proper tribunal of such county to answer the charge for which he has been arrested and all fees accruing shall be taxed against the party arrested, which fees are hereby declared to be part of the compensation of said sheriff's authorized to be fixed by the legislature under section 6, article VIII of the constitution, to be paid such sheriffs in the same manner as fees are paid for like services in other criminal cases. All patrol officers are hereby directed to deliver all bonds accepted and approved by them to the sheriff of the county, in which the offense is alleged to have been committed . . ."

I do not pass upon the constitutionality of this act or any part thereof.

In answer to the first question, inasmuch as the law states that the patrol officer "shall obtain from such person arrested a recognizance or, if deemed necessary a cash bond or other sufficient security," it is my opinion that the Highway Patrol officer has the authority to release a person arrested by him on his own recognizance, which I suggest be evidenced by a writing.

In answer to the second question:

Section 321.05 Florida Statutes 1941, as amended, neither directs nor authorizes that affidavit be made by an arresting highway patrolman. The statutes are construed to require the patrol officer, when arrest has been made by him without warrant, to deliver the accused forthwith to the sheriff of the county wherein the arrest is made; or if a bond has been accepted, such bond shall be delivered forthwith to the said sheriff; or if a recognizance has been obtained the patrol officer shall forthwith inform the sheriff of the condition thereof. After these things, or either of them, have been done, all further proceedings in the cause shall be prosecuted by the sheriff in the same manner as they would be if the sheriff had made the arrest, and all fees which shall accrue thereafter shall be paid to the sheriff as part of his compensation, as provided by said chapter.

In answer to the third question, in light of the stated section, supra, 321.05, Florida Statutes 1941, as amended, I do not find any authority for the Highway Patrol officer, after making an arrest, to carry the defendant forthwith before the judge of the court having jurisdiction of the charge for any disposition. The law distinctly says that "The person arrested shall be delivered forthwith by said officer to the sheriff of said county or he shall obtain from such person arrested a recognizance or, if deemed necessary a cash bond or other sufficient security conditioned for his appearance before the proper tribunal of such county to answer the charge for which he has been arrested . . ."

I therefore answer this question in the negative.

In answer to the fourth question, inasmuch as question 1 answered the third question in the negative, there is no answer required to this question.

July 17, 1948.—048-250.

#### PENSION FUND

**QUESTION:** May a member of the Florida Highway Patrol resign from the service and withdraw from the pension fund that part of his contribution thereto as directed by statute, and at a later date, upon reentering the service, reimburse the fund with the amount withdrawn and receive credit for the period of his prior employment?

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

The Highway Patrol Pension Fund Act requires compulsory contribution by the members of the patrol. Section 321.17 (3) provides that a member who may cease to be an employee of the Highway Patrol before attaining retirement or becoming eligible for benefits thereunder shall be paid all of the contributions made by him standing to his credit in the Florida Highway Patrol Pension Fund less ten percent thereof which shall be retained as bookkeeping and service charge. It is not optional with the patrolman whether he shall receive reimbursement.

Section 321.20, Florida Statutes, 1941, requires twenty years of service by the members of the pension fund as a prerequisite to their eligibility to participate in the fund. The statute contains no provision which would indicate an intention that the twenty years of service required may be interrupted or accumulated.

Under a fair interpretation of the act, when a member of the fund serves his relation with the patrol service he forfeits all years of service to which he may have been entitled at the time of his resignation or discharge.

The question is accordingly answered in the negative.

## LICENSES

August 21, 1948.—048-276.

## HOUSE-CAR—LICENSE FEES

QUESTION: Under the law, what series of license plate is required for a vehicle commonly known as a house-car, that is, a truck with a body so constructed as to be used for living quarters only.

*To Honorable John Kilgore, Motor Vehicle Commissioner:*

Under the motor vehicle laws, the classification of vehicles for the purpose of license within such a vehicle as is described in the question is "trucks for private use." The truck in question would come within series "G," "GH," "GK," or "GL," depending upon the net weight of the vehicle as provided in section 320.08, Florida Statutes, 1941.

There is no classification of vehicles used only for living quarters, except such vehicles as are drawn or towed by a motor vehicle and not capable of being self-propelled.

March 25, 1947.—047-81.

## NON-RESIDENT TRAILERS—EXEMPTION

QUESTIONS: 1. If a visitor displays an Ohio license plate on his motor vehicle while driving a house trailer upon which is displayed a Florida license plate, are both vehicles properly licensed?

2. Are nonresidents operating a motor vehicle drawing a house trailer upon the public highways when the motor vehicle displays a license plate issued by a state other than the state issuing the license plate displayed upon the trailer complying with the motor vehicle laws of Florida?

Answering question one, I call attention to section 320.37, wherein a nonresident is not required to secure a license plate for his motor vehicle as a condition precedent to the privilege of operating it upon the public highways, if it displays a valid license plate issued by the state of the owner's residence. This exemption extends alike to motor vehicles and to house trailers, but the question of exemption or nonexemption does not arise in cases where a Florida license is exhibited on either vehicle. A nonresident may acquire a house trailer in the State of Florida and secure a license plate permitting its operation regardless of whether the vehicle drawing it bears a Florida license plate or not. The answer to the first question is therefore in the affirmative.

The second question presents a different situation. A nonresident is exempt from the law requiring the display of a license plate either upon his motor vehicle or his house trailer if both vehicles display a valid license plate issued by the state of the owner's residence. Where the license plate displayed on a motor vehicle is issued by a state other than that issuing the license plate for a house trailer, the owner is not complying with the law because of the fact that he may have or claim but one state of residence. The second question is accordingly answered in the negative.

November 5, 1947.—047-377.

## TRAILER LICENSES—MINIMUM FRACTIONAL FEE

QUESTION: Is the annual license fee imposed upon house trailers by the provisions of chapter 23969, acts of 1947, subject to the half-year reduction provided for certain other license fees as set forth under section 320.14, Florida Statutes, 1941.

*To Honorable John Kilgore, Motor Vehicle Commissioner:*

Chapter 23969, Laws of Florida, 1947, provides for the imposition of license tax upon trailer and vehicles not self-propelled, used for housing



accommodations, and known as trailer coaches. The statute fixes the annual license fee to be paid by owners and operators of house trailers at the sum of ten dollars, and provides that the license fee shall be paid at the same time and in the same manner as provided for other motor vehicle licenses. The law governing the time and manner of payment of license fees imposed upon other motor vehicles is prescribed by section 320.14, Florida Statutes, 1941, which particularly provides that any motor vehicle or trailer acquired after June 30 of any year and not subject to registration prior to that time shall be charged at the rate for such registration one-half the annual rate; provided, however, that no license shall be issued for less than five dollars (with certain exceptions not material to this question).

Inasmuch as the law fixes a minimum fractional registration license fee at the sum of five dollars, the question is answered as follows:

Upon application for registration of a house trailer prior to June 30 in any year, the license fee to be charged for such registration is ten dollars, and upon application for registration of a house trailer after June 30 of any year, accompanied by said proof that the vehicle was not subject to registration prior to June 30 of the particular year, the license fee to be charged for such registration is five dollars.

The provision of section 320.14, Florida Statutes, 1941, authorizing fractional fees of one-fourth the annual rate has no application to house trailers, since one-half of the annual rate is the minimum fractional fee which may be charged.

July 16, 1948.—048-242.

#### LOCAL BUSES—"C" SERIES LICENSE PLATES—TERRITORIAL LIMITS

QUESTION: May a motor vehicle for which a "C" series license plate has been secured be lawfully operated within a distance greater than ten miles beyond the territorial limits of the municipality within which its operation is licensed, in situations where a second municipality is located in whole or in part within the ten-mile limit?

*To Honorable John Kilgore, Motor Vehicle Commissioner:*

Section 320.02, Florida Statutes, 1941, provides that application for registration of a motor vehicle for operation wholly within the limits of a municipality shall identify the municipality within which operation of the vehicle is sought to be licensed.

Section 320.08, Florida Statutes, 1941, requires that upon the registration of such vehicle a license fee shall be paid in the amount provided for vehicles classed as "C" series (local buses), authorizing the operation of the vehicle "wholly within cities or within ten miles thereof." The use of the plural noun "cities" in the provision of the statutes classifying vehicles as "local buses" does not have the effect of extending the territory within which the vehicle may be operated beyond the distance of ten miles from the limits of the municipality within which the vehicle is licensed to operate, regardless of whether another municipality may be located wholly or in part within the authorized area of operation.

The question is accordingly answered in the negative.

October 13, 1947.—047-363.

#### TRAILERS—AD VALOREM TAXES ON TRAILERS—AVOIDANCE OF TAXES

QUESTION: May the owner of an automobile trailer which has been assessed for ad valorem taxes as tangible personal property because no cur-

rent automobile trailer license tax has been paid thereon, avoid the payment of such ad valorem taxes by the payment of an automobile trailer license thereon for the current or following year?

*To Honorable C. M. Gay, State Comptroller:*

On March 28, 1946, this office held that automobile trailers were subject to ad valorem taxes when permanently or semi-permanently parked and used for living or housing quarters, where no license tax had been paid thereon and where they carried no current license tag. This opinion is reaffirmed.

Chapter 23969, Laws of Florida, acts of 1947, fixes a license fee of ten dollars per annum for automobile trailers used for housing accommodations, which license tax is in lieu of all other taxes thereon. Chapter 24113, Laws of Florida, acts of 1947, provides for the assessment of ad valorem taxes against automobile trailers that have no current year's license tag thereon, which tax may be assessed at any time and when assessed is payable within fifteen days from the date of the certificate of valuation to be issued by the tax assessor; however, the owner of such automobile trailer is given the right to purchase a license tag in lieu of paying the said ad valorem taxes and paying all costs and charges in connection with the said ad valorem assessment prior to the purchase of such license tag and notice thereof to the taxing officials. Chapter 24113 became effective on June 16, 1947. The assessment of ad valorem taxes made by chapter 24113 was upon all automobile trailers that have no current year's license tag; this seems to be all inclusive and would seem to include any trailers assessed for ad valorem taxes upon the tax rolls prior to the enactment of said chapter, which repeals all conflicting laws.

I am, therefore, of the opinion that such owner may avoid the payment of such ad valorem taxes by the purchase of a proper license tag for the trailer for the current year. Taxes for one year cannot be avoided by the purchase of a license tag for the following year.

February 6, 1948.—048-41.

#### TRAILERS—AVOIDANCE OF TAXES—AD VALOREM TAXES

**QUESTION:** After inspection has been made by the tax assessors, and personal property assessments against unlicensed trailers are placed on the tax roll, and the owners fail to purchase a license tag within the fifteen days after the issuance of certificate of valuation by the tax assessor, does the assessment made remain valid and collectible, even in the event license tag may be purchased for the trailers after expiration of the fifteen day limit?

*To Honorable C. M. Gay, State Comptroller:*

On October 13, 1947, official opinion was pronounced upon a question very closely related to the question now presented. The assessment of automobile trailers as tangible personal property subject to taxation is governed by chapter 24113, Laws of Florida, 1947. The statute authorizes the county tax assessor of the county wherein a trailer is found which does not have affixed to it a current year's Florida license tag, to issue a certificate of valuation at any time and place the same in the hands of the tax collector of the county; whereupon the tax collector shall collect the amount of tax upon the affixed valuation within fifteen days from the date of such certification, and if same is not paid within that time shall levy upon the vehicle and sell the same for the recovery of the tax.

The statute by express terms, however, provides:

"Provided, however, that the owner of such trailer may purchase a Florida license tag for such trailer at any time prior to such aforesaid levy and sale, and the same shall operate to satisfy

such ad valorem tax assessment and levy upon such owner paying any fees allowed by law which have accrued to such tax assessor and tax collector prior to notification to them of the purchase of such Florida license tag."

The language employed by the Legislature in the foregoing provision answers the question in the negative.

December 22, 1947.—047-425.

#### MAXIMUM LOAD ON HIGHWAYS—NUMBER OF AXLES—WEIGHT

**QUESTION:** May a vehicle which is equipped with more than two axles, and less than four, be legally operated on a public highway in the State of Florida where its gross weight exceeds 40,000 pounds and exceeds 18,000 pounds per axle when the said vehicle has affixed thereto, in addition to other required license plates or tags, a license plate or tag known as a maintenance tag?

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

Section 320.40, Florida Statutes, 1941, fixes the maximum weight of load which may be drawn in any vehicle while operated upon any state road. The maximum gross weight, including weight of the vehicle, of any single vehicle is fixed at 16,000 pounds unless specific authority has been obtained from the State Road Department or the Railroad Commission, or unless each vehicle is equipped with vacuum, booster, electric or air brake, in which event the maximum load is fixed at 18,000 pounds per vehicle. A combination of truck and two-wheel trailer is permitted a gross weight of 18,000 pounds excepting motor vehicles under the jurisdiction of the Railroad Commission. This section further provides the maximum weight permitted, based upon the number of pneumatic tires in contact with the road, but fixes the maximum weight under all circumstances at 40,000 pounds.

Section 320.73 requires that any truck, the gross weight of which shall exceed 18,000 pounds, or any tractor and semi-trailer combination, the gross weight of which shall exceed 34,000 pounds, shall secure from the motor vehicle commissioner and affix to the said motor vehicle, in addition to any other license plate or tag, a license plate or tag to be known as a maintenance tag. The two statutes are unrelated and have separate application. The effect of section 320.73 does not extend the maximum load of 40,000 pounds fixed by section 320.40.

The question is accordingly answered in the negative.

April 10, 1947.—047-101.

#### PICKUP TRUCKS—FOR HIRE TAGS

**QUESTIONS:** 1. Are for hire license plates required for pickup trucks operated by common carriers for delivery of freight from warehouse to consignee, if no charge is made other than the general one made at the point of origin?

2. Are for hire licenses required for pickup trucks engaged in general pickup and delivery service for compensation within the limits of a municipal corporation?

*To Honorable George H. Asbell, Motor Vehicle Commissioner:*

For hire license plates are required to be affixed to all vehicles including motor vehicles or trailers drawn by motor vehicles when used for the transportation of commodities or material for compensation. There is nothing in the law which would exempt pickup trucks operated by common carriers for delivery of goods from their warehouse to the consignee. The first question is accordingly answered in the affirmative.

The fact that a truck, engaged in general pickup and delivery service for compensation, is operated wholly within the limits of a municipality does not exempt such a vehicle from the statutory provision requiring that a for hire license plate be affixed thereto. The second question is accordingly answered in the affirmative.

March 6, 1947.—047-63.

#### REGISTRATION—NONRESIDENT OWNERSHIP

**QUESTION:** In one of the counties of the state a teacher employed temporarily by the County School Board uses her husband's car to drive to and from school; also, to visit her children who attend a private school in an adjoining county. The car is registered in the name of her husband who is employed as an engineer on the island of Guam. Both she and he are residents of the State of Georgia and the car used bears a 1947 Georgia license tag. Is a Florida tag required?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Section 320.37, Statutes of 1941, exempts a nonresident who has complied with the provisions of law of his state relative to motor vehicles, from the requirements of the Florida motor vehicle registration law as to registration and license; provided he displays his out-of-state registration number. There are exceptions not pertinent to the foregoing inquiry. Section 320.38 makes certain exceptions to the exemption allowed in section 320.37, and reads in part:

"... In every case where a nonresident shall accept employment, or engage in any trade, profession or occupation in the State of Florida, or shall enter his children to be educated in the public schools of the State of Florida, such nonresident shall be required to register his motor vehicles in this state, if such motor vehicles are proposed to be operated on the highways of the State of Florida."

The employment of the nonresident teacher, even though temporary, brings her within the exceptions to the nonresident exemption, and it is my opinion that the law requires her to purchase a Florida license tag and display the same on the automobile.

August 8, 1947.—047-250.

#### REGISTRATION CERTIFICATE—TRANSFER—FEE

**QUESTION:** Under what provisions of section 320.32, Florida Statutes, 1941, is the motor vehicle commissioner required to collect the fee of \$1.00 for the transfer of registration of a motor vehicle from a previous owner to a purchaser?

*To Honorable John Kilgore, Motor Vehicle Commissioner:*

On January 29, 1935, page 569, 1935-1936 Biennial Report, my predecessor in office rendered his opinion upon the question presented.

There has been no change in the law covering the transfer of registration of motor vehicles subsequent to the rendition of the aforementioned opinion.

The question is accordingly answered in the affirmative.

August 7, 1947.—047-242.

#### TRAILER COACH DEALER—SPECIAL LICENSE—BOND

**QUESTIONS:** 1. Under the provisions of chapter 23665, Laws of 1947, is a trailer coach dealer as therein defined required to secure a spe-



cial license for the privilege of doing business at each location at which he operates a branch station for the sale of trailer coaches?

2. Are trailer coach dealers required to furnish indemnity bonds under the provisions of chapter 23665, Laws of 1947, governing their doing business at each branch station operated in connection with the main business?

*To Honorable John Kilgore, Motor Vehicle Commissioner:*

The occupational license tax, under chapter 23665, is imposed upon any person, firm or corporation engaged in the business of dealing in trailer coaches. There is nothing in the act which would indicate any intention on the part of the Legislature to impose an additional license tax upon any dealer authorized and licensed to engage in the business of dealing in trailer coaches for the privilege of maintaining branch stations or stores in the distribution of vehicles. In all cases where the licensed dealer is the sole owner of the business and exercises sole authority and control over the sale of vehicles through one or more distributing stations, he is not required to secure more than one license. The first question is accordingly answered in the negative.

Section 4 of the cited statute requires that each dealer, as a prerequisite to his right to secure a license, shall deliver to the motor vehicle commissioner a good and sufficient bond in the sum of \$5000 conditioned as required by the provisions of the act. There is nothing in the section that would indicate a legislative intent to require the posting of an additional bond in the event the dealer shall maintain and operate more than one station or store for the sale of trailer vehicles. The second question is accordingly answered in the negative.

September 14, 1948.—048-298.

#### SALE OF TAXICABS, U-DRIVE-IT—SALE OF TRUCKS

QUESTION: Do the provisions of section 319.14, Florida Statutes, 1941, include trucks?

*To Honorable John Kilgore, Motor Vehicle Commissioner:*

The definition of a truck under the motor vehicle law of Florida is set forth in sub-paragraph 10, section 320.01, Florida Statutes, 1941:

“Trucks” include any motor vehicle designed or used principally for carrying things other than passengers . . . any unit consisting of tractor or trailer so constructed as to haul loads other than persons.”

By the designation of those vehicles regulated by section 319.14 as “taxi cab, u-drive-it or for hire,” it was clearly the intention of the Legislature that this section should apply to motor vehicles used for the purpose of carrying persons or passengers, and was not intended to be applicable to “for hire vehicles” as defined by sub-paragraph 16, section 320.01.

The question is accordingly answered in the negative.

#### DRIVERS' LICENSES

July 23, 1948.—048-231.

#### JURISDICTION MUNICIPAL COURT—AUTHORITY MUNICIPAL POLICE

QUESTION: In the absence of an ordinance, does a municipal police officer have the authority to arrest and prosecute a person for violation of state drivers' license laws in municipal courts?

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

I assume the violation in question is a violation for the non-possession of a state driver's license.

Should I concede for the purpose of this opinion only, that the said officer has the authority and power to arrest a person for such violation, there is no jurisdiction in a municipal court to try a violator of such an offense which is a violation of a state law.

I answer the question in the negative.

July 17, 1948.—048-254.

#### SUSPENSION—DRIVER'S LICENSE—INSURANCE COMMISSIONER

**QUESTION:** Is a person whose driver's license has been suspended by the state treasurer, or his authority, subject to arrest and prosecution by the Florida Highway Patrol upon the charge of operating a motor vehicle without a driver's license?

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

Section 322.15, Florida Statutes, 1941, requires that the operator of a motor vehicle upon the public highways shall at all times have in his immediate possession an operator's or chauffeur's driver's license and that he shall display the same upon the demand of a patrol officer. Section 322.34, Florida Statutes, 1941, makes it a misdemeanor for any person to operate a motor vehicle upon the public highways while his operator's or driver's driving license has been canceled, suspended or revoked.

Section 324.04 (2), Florida Statutes, 1941, provides that within thirty days after receipt of notice of accident involving any motor vehicle, the state treasurer (commissioner), shall suspend the license of the owner or operator of the said vehicle unless such owner or operator had prior thereto made himself exempt from the operation of the statute imposing upon him liabilities prescribed by section 324.04. Section 324.04, Florida Statutes, 1941, further provides that the director of the Department of Public Safety (and others), shall carry out and execute and enforce all orders of suspension issued by the commissioner.

Under the provisions of section 324.04, Florida Statutes, 1941, any owner or operator of a motor vehicle who may have suffered suspension of his driver's license because of involvement in a motor vehicle accident may have such suspension revoked and his license reinstated upon compliance with the requirements of the statute.

Section 324.16, Florida Statutes, 1941, requires any person whose driver's license may have been suspended under the provisions of the act to surrender the same to the commissioner.

Applying the statutory provisions as outlined to the situation presented by the question, any person whose license to operate a motor vehicle has been suspended under chapter 324, Florida Statutes, 1941, forfeits the privilege of operating a motor vehicle upon the public highways until he has complied with the provisions of chapter 324. Considering both of the applicable statutes together, the suspension by the commissioner, of the privilege of operating a motor vehicle under the provisions of chapter 324, has the same effect as the suspension by the director of the Department of Public Safety, of the privilege of operating a motor vehicle under the provisions of chapter 322. The question is accordingly answered in the affirmative.

October 21, 1947.—047-353.

#### TRAFFIC REGULATIONS—SUSPENSION OF DRIVER'S LICENSE

**QUESTION:** A memorandum was issued from the Department of Public Safety, dated August 26, 1947, to the effect that juveniles between

fourteen and sixteen years of age having been found violating driver's license restrictions should have such license taken up and forwarded to the Department of Public Safety with a letter of explanation of the offense committed. Presumably, this is an instruction to all police officers to take such action before offender has had a hearing in court to determine whether a violation took place or not. Can such an action be legally done unless and until a violation has been legally established by a competent court with jurisdiction over the offender?

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

Section 322.05, Florida Statutes, 1941, says:

"322.05 Persons not to be licensed. The department shall not issue any license:

"(1) To any person, as an operator, who is under the age of sixteen years, except that the department may issue a restricted license as hereinafter provided, to any person who is at least fourteen years of age."

It will be seen that a juvenile between the ages of fourteen and sixteen is not entitled as of right to a license. Said section says the department may issue a restricted license, thus leaving it to the discretion of the department whether to issue or not issue same. If the department does see fit, in its discretion, to issue such a restricted license, it may do so on such terms and conditions as it deems proper. One of these conditions so fixed by the department is that any traffic violation by such licensee shall automatically cancel said license. The department which adopted this restriction has the right to interpret the effect of same and this it has done by the aforesaid memorandum. Whether or not such restrictions have been violated is for the determination of the department upon evidence satisfactory to it. See section 322.16 (3), Florida Statutes, 1941, which reads as follows:

"(3) The department may, upon receiving satisfactory evidence of any violation of the restriction of such license (restricted license), suspend or revoke the same, but the licensee shall be entitled to a hearing as upon a suspension or revocation under this chapter."

It is my opinion, therefore, that such a memorandum as aforementioned, with respect to such restricted license, is legal and it is not necessary that a violation be legally established by a competent court before said office can cancel such a license.

October 25, 1948.—048-330.

#### EXPIRATION OF LICENSE—FAILURE ON EXAMINATION

QUESTION: If the holder of an operator's or chauffeur's license, which license has expired, makes application within eleven months after expiration and elects to take a driver's examination as provided by section 322.18, Florida Statutes, 1941 (FSA), as amended by H. B. 526, chapter 24346, acts of 1947, and fails to pass such examination, may he then elect to pay the delinquent fee of \$1.00 and have his license issued notwithstanding the failure to pass the examination?

*To Honorable H. N. Kirkman, Director, Department of Public Safety:*

The question presented is governed by the provisions of section 322.05 (6) (7). The quoted section deals with persons to whom a license shall not be issued. Paragraph 6 provides that no license shall be issued to any person who is required by chapter 322 to take an examination unless such person shall have successfully passed such examination.

Paragraph 7 provides that no license shall be issued to any person when the director has good cause to believe that the operation of a motor vehicle upon the highways by such person would be detrimental to public safety or welfare. Under the circumstances presented, the applicant has demonstrated by his failure to pass the required examination that he is not qualified for registration or license, regardless of whether a strict interpretation of the provisions of paragraph 6 would constitute the applicant as being a person required by the applicable chapter to take an examination.

The question is accordingly answered in the negative.



## CHAPTER XX

### AVIATION

#### LICENSING AIRCRAFT AND PILOTS

April 28, 1948.—048-137.

##### AIRCRAFT REGISTRATION FEE

**QUESTIONS:** 1. An owner registers his aircraft and pays his registration fee to the tax collector of the county in which he lives. What county should receive credit for said fee?

2. An owner registers his aircraft with and pays his registration fee to the tax collector of a county other than the county in which the owner lives. Shall the county of the owner's domicile, or the county where the tax is paid be given credit for said fee?

3. An owner of aircraft living in Florida registers his aircraft with and pays his registration fee directly to the motor vehicle commissioner at Tallahassee. Should the county where the owner has his domicile receive credit for said fee?

4. A corporation, owner of a large number of aircraft engaged in intra-state business, registers its aircraft with and pays its registration fee to the collector in the county in which it has its principal place of business. Does the county where the aircraft is so registered receive credit for said fee, even though the aircraft operate in other counties of the state?

5. A corporation, owner of a large number of aircraft engaged wholly in intra-state business, registers its aircraft with and pays its registration fee to the motor vehicle commissioner in Tallahassee instead of in the county where its principal place of business is located. Does the county where the corporation has its principal place of business receive credit for said fee, even though the aircraft operate in other counties?

6. A corporation, owner of a large number of aircraft engaged partially or wholly in interstate, or foreign commerce, registers its aircraft with and pays its registration fee to the motor vehicle commissioner at Tallahassee, (or may perhaps register its aircraft with and pays its registration fee to a tax collector of a county of the state). How shall the said fee be allocated?

##### *To Florida State Improvement Commission:*

Section 18, chapter 24045, Laws of Florida, 1947, in part reads as follows:

"The remaining 50% shall be paid by the Florida State Improvement Commission to the several counties of the State of Florida in proportion to the amount of funds collected from the registration of aircraft within that county."

I do not pass upon the constitutionality of said chapter 24045 or any part thereof—especially the right of the Legislature to classify aircraft as motor vehicles, or whether the registration fee or the disposition thereof is valid under the interstate commerce clause of the United States Constitution applicable to aircraft engaged wholly or in part in interstate commerce.

In answer to the first question, in my opinion, the county where the owner registers his aircraft and pays his registration fee should receive credit for collection of said part of said registration fee.

In answer to the second question, in my opinion, the county where the aircraft is registered, and the registration fee is paid, should receive credit for collection of said part of said registration fee.

In answer to the third question, in my opinion, the county of the owner's domicile is not entitled to receive credit for the said registration fee, except insofar as it might be entitled to participate in the fund allocated to the several counties which collected registration fees as provided in said section 18.

In answer to the fourth question, in my opinion, the county where the aircraft is registered should receive said part of the registration fee, even though the aircraft may operate in other counties.

In answer to the fifth question, in my opinion, the county where the said corporation has its principal place of business is not entitled to receive credit for said part of the registration fee even though the aircraft may operate in other counties, except insofar as it might be entitled to participate in the fund allocated to the several counties which collected registration fees as provided in said section 18.

In answer to the sixth question the registration fee paid by such aircraft is in effect an advance payment and is subject to a refund. (Section 8 of chapter 24045.) I cannot advise any allocation to any county of any part of the registration fee. I can only suggest that it be held in an appropriate fund for the action of a future Legislature. If attempt should be made to allocate any of the said fifty percent (50%) of the said registration fee, as provided in said section 18 of said chapter 24045 for general county purposes, in my opinion, that part of said registration fee might be held invalid. (See *State vs. Mizell*, 174 So. 216.)

Attention is invited to the fact that in making any of the allocations to the several counties entitled to same, such allocations should be postponed until the end of the license year because adjustments might be required. (See Sections 9 and 17 of said chapter.)

## CHAPTER XXI

### HIGHWAYS, BRIDGES AND FERRIES

#### COUNTY ROADS AND BRIDGES

December 13, 1947.—047-428.

#### INCORPORATED CITIES—PAYMENT FOR PAVING—COUNTY PAYMENT ON STREETS

**QUESTION:** Is there any provision of law which requires the county commissioners to assist incorporated cities and towns within their counties in the maintenance and upkeep of streets within said incorporated cities and towns?

*To Honorable W. F. Anderson, County Attorney, Bronson, Florida:*

Section 343.17, Florida Statutes, 1941, reads as follows:

"The board of county commissioners shall levy a tax of not to exceed five mills on a dollar on all property in said county each year for road and bridge purposes . . . provided, however, that one-half the amount so realized from said special tax on the property in incorporated cities and towns, shall be turned over to said cities and towns, to be used in repairing and maintaining the roads and streets thereof, as may be provided by the ordinances of such cities and towns."

This is the only law that I know of bearing on this question. I think it answers the question.

May 15, 1947.—047-136.

#### ROAD—RIGHT-OF-WAY—DEDICATION

**QUESTIONS:** 1. Can Monroe county construct a public road on a section line using privately owned property for the roadway without a dedication, of said land as a road, by the owners of said property?

2. In the event the county has the right to so construct a road, would the county be liable to property owners whose consent has not been obtained or who did not join in the request for the construction of said road?

*To Honorable Paul E. Sawyer, Legal Advisor, Board of County Commissioners, Monroe County, Key West, Florida:*

I think the questions are answered by section 343.05, Florida Statutes, 1941, which reads as follows:

"When a new road is to be established, or an old road changed the county commissioners shall issue an order to three disinterested freeholders in the county to view and mark out the best route for the said proposed road, and they shall subscribe to an oath to perform their duties faithfully; provided, such persons shall not receive any compensation for said services. After the route is marked out and their report is accepted by the county commissioners, the county commissioners shall make an order for the opening of said new road or changed road, after giving thirty days' notice thereof, by posting at the court house and at some public place nearest the road sought to be changed or established; and if the road so laid out shall pass through the lands of any persons who shall object to or consider themselves aggrieved by

the same, and the board of county commissioners and the persons aggrieved cannot agree upon a reasonable compensation to be paid out of the county treasury to such aggrieved person by order of the board of county commissioners, then and in that event, the said board of county commissioners may proceed under chapter 73 of these statutes to acquire said lands by eminent domain. The county commissioners shall order the damages assessed to be paid out of the county treasury, if the same be a public road, together with all costs of the proceedings. All new roads laid out and established shall be run as near as may be upon section lines and subdivisions thereof."



## CHAPTER XXII

### CONSERVATION, ARCHEOLOGY AND GEOLOGY

#### BOARD OF CONSERVATION

September 13, 1948.—048-300.

##### SALE OF FLORIDA GEOLOGICAL SURVEY PUBLICATIONS

**QUESTION:** The Florida Geological Survey, which has printed numerous publications, finds, because of the enhanced cost of printing and mailing such publications that it is desirable to make charges therefor sufficient to cover such printing and mailing. May the Florida Geological Survey lawfully make such charges for said publications, and if so, how should the proceeds be deposited?

*To Honorable Herman Gunter, Director, Florida Geological Survey:*

The Legislature of 1947 appropriated a substantial sum for the printing of such publications. It is not presumed that the state shall furnish such publications free to every person asking for same.

I feel that the Florida Geological Survey can sell these publications to persons desiring same in a sum sufficient to cover the cost of printing and mailing. I believe the money so realized from the sale thereof should be kept in a separate fund and used by the Florida Geological Survey for the purpose of again reprinting these publications, if that should become necessary, or printing other publications if the Florida Geological Survey so desires.

I would suggest that the Florida Geological Survey get the consent of the Budget Commission as to these practices so that there will be no misunderstanding with that board about same.

In drawing this conclusion, I am persuaded that these proceedings are legal by the fact that for many years certain agencies of the state have printed and sold other publications to the public. The proceeds have been kept in separate funds and used solely for printing and mailing other publications published by these agencies, and the Legislature, cognizant thereof, has not seen fit to adopt a different rule.

May 17, 1948.—048-166.

##### FISHING BOAT LICENSES—RESIDENT CORPORATION

**QUESTION:** Are fishing boats owned by corporations created and existing under the laws of the State of Florida required under sections 373.10 and 373.25, Florida Statutes, 1941, to secure a nonresident boat license if registered in a foreign state?

*To Honorable J. T. Hurst, Supervisor, State Board of Conservation:*

Section 373.10 imposes an additional license of twenty-five dollars per vessel upon all vessels owned wholly or in part by aliens or nonresidents of the state. Section 373.25 imposes an additional license of twenty-five dollars upon all aliens or nonresidents of the State of Florida on all boats owned in whole or in part by such alien or nonresident. A corporation created and existing under the laws of the State of Florida is a resident corporation. All of its properties are owned by the corporation and not by the individual share holders. A boat owned by a corporation created under the laws of the State of Florida is not a nonresident boat nor is it owned wholly or in part by an alien or nonresident.

The question is accordingly answered in the negative.

August 14, 1947.—047-264.

GEOLOGICAL SURVEY—CONTRACT FOR WELL DRILLING—  
PRIVATE PAYMENT

**QUESTION:** May the Florida Geological Survey enter into an agreement with the Florida Well Drilling Contractors Association, Inc., whereby the latter will underwrite to the extent of twelve hundred dollars (\$1200.00) per annum, the cost of having a competent engineer from the Florida Geological Survey receive data from all well drilling contractors, both members and non-members of the Florida Well Drilling Contractors Association, Inc.?

*To Dr. Herman Gunter, Director, Florida Geological Survey, Florida State University:*

This is a rather general question, and this opinion will be limited to such, with the express reservation that the authority of the Florida Geological Survey to enter into any specified agreement would to a large extent depend upon the terms and conditions of such agreement.

Section 373.17, Florida Statutes, 1941, sets out the duties of the geological department, which includes surveys and explorations of minerals, water supply and other natural resources of the state.

I am of the opinion that the geological department could certainly and legally enter into an agreement whereby it would receive data, reports, information, etc., from private sources, at the expense of such private sources, and without any obligation on the part of the geological department.

However, if such agreement required the employment of personnel, such employment would, in my opinion, be governed by section 373.16, Florida Statutes, 1941, which provides that:

"The governor shall employ such suitable persons, as in the judgment of the board may be necessary, to conduct a geological survey of the state."

Further, I find no prohibition against employment of personnel on a part time basis, such as is described in attachments to your letter.

July 19, 1947.—047-231.

SHRIMP—PROVISO—MEANING—LEGAL LIMIT

**QUESTION:** Can a construction be placed upon chapter 24268, and chapter 23952, Laws of Florida, 1947, to effectuate both laws with reference to the count of shrimp to be taken?

*To Honorable J. T. Hurst, Supervisor, State Board of Conservation:*

Chapter 23952, a special law, became a law on June 7, 1947. This law makes it unlawful to take shrimp with their heads on that count more than 45 to the pound, or shrimp with their heads removed that count more than 67 to the pound. It is apparent that this law attempted to define a particular size shrimp, the same size shrimp with or without heads.

Chapter 24268, a general law, became a law on June 16, 1947. This law makes it unlawful to take shrimp of a lesser size than that which count 55 to the pound with their heads off. In section 2A it was provided that the provisions of this law would not apply to those counties having special acts providing that shrimp or prawn may be taken, etc., which count less than 55 to the pound with the heads off or 67 with heads on. It should be noted that in section 2A, the exception provides that the general law will not be applicable in counties that have special acts that do not permit the taking of shrimp which count less than 55 to the pound with heads off or 67 with heads on. The first defining size of the last clause of section 2A

defines the same size shrimp that may be taken under the general law. It would appear that the Legislature in defining the size shrimp to be taken under the special law, and thus exempt from the provisions of the general law, has made an absurd definition, for it is absurd to say that 67 shrimp with their heads on weighing a pound would be the same size shrimp as 55 shrimp with their heads removed weighing a pound.

The primary rule of statutory construction is that the intent of the Legislature be determined and that this intent is the law. The intent of the Legislature is to be derived from the language used in the statute; if from a view of the whole law a different intent is evident than that used by the language employed to express the Legislature's intent, the intent should prevail and not the literal import of the language.

Another rule of statutory construction is that there is a strong presumption against absurdity in a statute; it being unreasonable to suppose that the Legislature intended its own stultification, so that when language is subject to two senses, the one that will not lead to an absurd consequence will be adopted.

It is evident that the intention of the Legislature in section 2A of chapter 24268 is to except counties having local legislation pertaining to the size of shrimp that can be taken from the operation of the general law. If section 2A of chapter 24268 is to be given a sensible interpretation, it is necessary to invert the words "on and off" so they follow the size of shrimp to be taken, as set out in this section. Placing this interpretation upon the statute we have accomplished the obvious intent of the Legislature, that is, to exempt certain counties having local legislation pertaining to the size of shrimp that can be taken.

If this interpretation is placed upon the two statutes, it is apparent that both laws can be operative and that the provisions of chapter 23952 will control the size of shrimp taken in the territory covered by that local law.

Section 2A, chapter 24268, is a proviso. Another rule of statutory construction is that if a proviso as it is written can be given no sensible effect, it will be disregarded. There are exceptions which should be considered—if the proviso, section 2A, chapter 24268, is disregarded because it is an absurdity or cannot be given any sensible effect, then the rule of statutory construction that a subsequent general law will not repeal by implication a previous local law unless the general law undertakes to cover the whole subject matter, or makes specific reference to the local law; or if the general law is so repugnant to the local law that there is no logical field in which the two may operate. These exceptions do not appear in the two chapters under consideration.

In those localities in which chapter 23952, a special law, is applicable, shrimp that do not count more than 45 to the pound with their heads on, or that do not count more than 67 to the pound with their heads removed may be lawfully taken, etc. In those localities where chapter 24268, a general law, is applicable, shrimp that do not count more than 55 to the pound with their heads off may be lawfully taken, etc.

It is, therefore, my opinion that the question may be answered in the affirmative, that is, a construction can be placed upon chapter 24268 and chapter 23952, Laws of Florida, 1947, to effectuate both laws with reference to the count of shrimp that can be taken.

### FISH AND GAME, GENERALLY

April 25, 1947.—047-128.

#### PHOSPHATE PITS—FRESH WATER POOLS—JURISDICTION

QUESTION: In Polk county there are a large number of mined-out phosphate pits, located on land privately owned by phosphate companies,

which pits have been abandoned for mining purposes, have filled with water, and are found inhabited by the usual varieties of fresh water fish. The tracts of land on which the pits are located are fenced. The pits vary in depth from 5 to 50 feet, approximately, and vary in size from 1 to 6 acres, approximately. Some of these pits are connected with small natural water courses; some of them are in no way connected with natural water courses or lakes. Does the Game and Fresh Water Fish Commission now have jurisdiction over said phosphate pits and all fish located therein since the recent amendment to the Constitution of Florida (Article IV, Section 30)?

*To Honorable Chester M. Wiggins, County Judge, Polk County, Bartow, Florida:*

On November 2, 1927, the Honorable Fred H. Davis, who was then attorney general, held that if bodies of water are so connected that fish may pass from one body to another, the fish in the waters are therefore migratory and cannot be said to belong to any particular person, but where there is a small accumulation of water caused by a depression of the earth, which has no outlet or inlet, the fish in such a body of water may properly be said to be in the possession of the man who happens to own such a pond and, therefore, the law in question (section 371.04, Florida Statutes, 1941), expressly excludes such ponds from the operation of the game law.

On January 30, 1942, I rendered an opinion in which I held that it was not necessary to obtain a license to fish in phosphate pits, as such pits were therein described, none of which were mentioned as being connected with small natural water courses, but were stated to be from 5 to 50 feet in depth, privately owned and fenced.

It is true that both of these opinions were rendered prior to the adoption of the aforesaid amendment to the constitution of Florida; however, I think that these opinions are still applicable as I do not think that the amendment to the constitution enlarges the jurisdiction of the Game and Fresh Water Fish Commission so as to cover any waters except those mentioned in section 371.04, Florida Statutes, 1941.

If the phosphate pits are in no way connected with natural water courses or lakes they would not come under the jurisdiction of the Game and Fresh Water Fish Commission.

If these pits are such that they are connected with other bodies of water, streams or river, in such manner that fish may pass from one to the other, then I think that the Game and Fresh Water Fish Commission would have jurisdiction over same.

February 17, 1948.—048-69.

#### COURT COSTS—CRIMINAL ACTS OF AGENT

**QUESTION:** Should the state comptroller issue a warrant, payable from the state game fund, in payment of court costs assessed against one of the agents of the game and fresh water fish commission in a criminal prosecution for violation of the criminal laws of this state?

*To Honorable C. M. Gay, State Comptroller:*

It is my information that one of the agents of the game and fresh water fish commission was indicted in the Circuit Court of Washington County for violating one of the criminal laws of the state and upon trial was convicted and sentenced. The conviction of the agent of a crime is evidence that he was not acting within the line of duty when he violated the criminal law.

I find nothing in the constitution or statutes creating the game and fresh water fish commission and defining its powers and duties that would



justify the comptroller in approving a voucher and issuing a warrant in payment of the aforementioned court costs.

Section 372.09, Florida Statutes, 1941, provides that the funds resulting from the administration of the fresh water fish and game laws shall constitute the "state game fund" and shall be used in carrying out the provisions of such laws and for no other purpose. Section 372.10 provides for the payment by warrant of all accounts, claims and bills, of every nature, against the commission. The commission is not liable for the result of any act on the part of a conservation agent which flows from the exercise of unauthorized power. Acts of an official, unauthorized by the laws of the state, although done in the name of the state, are individual acts for which he alone, in his individual capacity, and not the state, is responsible. It, therefore, appears that costs in question are not such as should be paid by the state from the state game fund.

The foregoing question is answered in the negative.

July 28, 1947.—047-222.

#### ISSUANCE OF LICENSES—AGENT OF JUDGE—VALIDITY

QUESTIONS: The county judges of Jefferson, Leon and Washington counties appoint agents to issue fishing licenses in Thomasville, Georgia, and Dothan, Alabama. When such licenses are so issued at said points outside the State of Florida—1. Would that affect the legality of said licenses?

2. Would the use of signature stamps by said county judges in signing said licenses affect the legality of said licenses?

3. Would the mere omission of the county judge's seal from said licenses affect the legality of same?

4. Would the licensee, fishing with license issued under circumstances under consideration, be subject to prosecution for failure to purchase license?

(In other words, would the fact that such license was issued out of the state, without the judge's actual signature but with stamp signature, and without county judge's seal, lay licensee liable to prosecution for failure to have any license whatsoever?)

*To Honorable Sam D. May, County Judge, Washington County, Chipley, Florida:*

The practice of such county judges as mentioned, if such there be and about which I have not been previously informed, is improper and I do not in any manner condone that practice. If these officers have been so conducting the sale of these licenses as to, in effect, sell them in places out of the state and by agents out of the state, I feel that they should be stopped at once. I cannot give my approval to same.

As to the legality of the licenses issued in places outside of the State of Florida, as mentioned, which licenses do not bear the seal of the county judge, required by section 372.57, Florida Statutes, 1941, I will say that such licenses may be technically illegal and might subject the holder thereof to prosecution, but as a practical matter I doubt if the party holding such a license would ever be successfully prosecuted in the courts of our state.

I hope it will not be necessary for the criminal courts to test the validity of these licenses and I hope that the practice of the county judges aforementioned, if same is being done by them, will be discontinued.

I see no objection to the county judges' issuing licenses in any place within their respective counties, but I know of no authority given to them to appoint agents outside of the State of Florida, or even outside of their counties. (Section 372.57, Florida Statutes, 1941.)

May 22, 1947.—047-141.

#### VIOLATION—BOAT AND MOTOR—SEIZURE

QUESTION: "In a case where a person is convicted of violation of the provisions of section 372.20, Florida Statutes, 1941, prohibiting the taking, or attempting to take, fresh water fish from the waters of the state by means except hook and line, rod and reel, bob, spinner or troll, is a boat or motor, which was being used by such person in connection with the commission of the offense, subject to seizure and forfeiture under the provisions of section 372.31, Florida Statutes, 1941?"

*To Honorable O. P. Johnson, County Judge, Osceola County, Kissimmee, Florida:*

Sections 372.20 and 372.31, Florida Statutes, 1941, are derived from chapter 13644, Laws of 1929, and their application is confined to the terms and provisions of the quoted chapter brought forward into the revision.

Both the original statute and the revision confine the power of seizure and forfeiture to the net, trap or fishing device, the use of which is prohibited. The term "fishing device" may not be construed to include a boat or motor employed in the operation of fishing.

Sections 371.19 and 371.25, Florida Statutes, 1941, to which reference is made, are derived from chapter 20883, Laws of 1941, defining an offense and prescribing a penalty therefor but are unrelated to the subject in question.

The question as posed is answered in the negative—the seizure of a boat or a motor not being authorized under the circumstances stated.

April 25, 1947.—047-113.

#### WARDEN—SEARCH AND SEIZURE

QUESTIONS: 1. Does a fish or game warden have the right to search the clothing and personal effects of a hunter, without a search warrant, to determine what game is in his possession?

2. Does a fish and game warden have the right to require a fisherman to allow the warden to search the live fish box or boat of a fisherman without a search warrant?

3. Does a fish or game warden have the right to open the doors of a man's automobile or to open up the rear end of his automobile or any box within the car without a search warrant, even though the car be parked in the woods or near water showing that the owner has either been fishing or hunting?

4. Does a fish or game warden have the right to search any of the outlying premises around a man's house or fish camp without a search warrant?

5. Does a fish or game warden have the right to search a man's hunting or fishing lodge without a search warrant either in his absence or in his presence when it is well known that the hunting or fishing lodge is used as such?

*To Honorable M. G. Adkins, County Judge, Gilchrist County, Trenton, Florida:*

Section 372.07, Florida Statutes, 1941, defining the police powers of the Game and Fresh Water Fish Commission and its agents, says:

"The commission of game and fresh water fish, and each and every of its duly authorized conservation agents, have power and authority, throughout the state . . . to arrest upon probable

cause without warrant any person found in the act of violating any of the provisions of said laws or, in pursuit immediately following such violations, examine any person, boat, conveyance, vehicle, game-bag, game-coat or any other receptacle for game, non-game birds, fresh water fish or fur-bearing animals, or any camp, tent, cabin or roster in the presence of any person stopping at or belonging to such camp, tent, cabin or roster, when he has reason to believe, has exhibited his authority and stated to the suspected person in charge his reason for believing that any of the aforesaid laws have been violated at such camp . . ."

Therefore, in my opinion, if the game warden finds any person in the act of violating any provisions of the said game law or is in pursuit immediately following such violation, questions 1, 2, 3 and 4 should be answered in the affirmative.

As to question 5, if the game warden finds any person in the act of violating any of the provisions of the said game law, or if the game warden is in pursuit immediately following such violation, I will say that in my opinion, he would have the authority to examine the man's hunting or fishing lodge in his presence or in the presence of any person stopping at or belonging to any such lodge, without a search warrant, but not in the absence of the owner or such person who might be stopping at or belonging to such lodge.

If the game warden does not find any person in the act of violating any of the provisions of said game law or is in pursuit immediately following such violation, then questions 1, 2, 3, 4 and 5 should be answered in the negative.

I do not, by this opinion, mean to pass upon the constitutionality of said section 372.07, Florida Statutes, 1941.

### SALT WATER FISHERIES

June 10, 1948.—048-191.

#### FISHING WITH SEINES IN COLLIER COUNTY

QUESTION: Is fishing with seines prohibited around and under a pier built by the town of Naples in Collier county? This pier extends seven or eight hundred feet into the waters of the Gulf of Mexico.

*To Honorable J. T. Hurst, Supervisor, State Board of Conservation:*

Chapter 17930, Laws of Florida, 1937, creates a breeding ground and reservation within Lee and Collier counties for salt water fish and prohibits the use of seines. This statute, however, describes the reservation as land locked or inland waters which do not include the location of waters referred to in the request for opinion.

The question is accordingly answered in the negative.

May 25, 1948.—048-190.

#### SPECKLED TROUT—SALT WATER FISH—CLOSED SEASON

QUESTION: Does chapter 23954, Laws of 1947, prohibit the taking, possession, transportation, buying and selling of the species of fish known locally as speckled trout?

*To Honorable Millard F. Caldwell, Governor:*

The species of fish generally known locally as "speckled trout" is not defined in the statutes relating to salt water fisheries. "Salt water fish" is defined by statute as all fish indigenous to salt water.

The lexicological definition of "trout" is a choice fresh-water fish of the family salmonidae or related genera of the salmon family (and further), any one of the various fishes resembling the trout but of a different family.

Chapter 23956, Laws of Florida, 1947, is not the origin of the law governing the taking of salt water trout. Chapter 10123, Laws of 1925, now compiled as section 374.12, Florida Statutes, 1941, prohibits the taking, possession, sale, transportation, etc., of salt water trout between the fifteenth day of June and the fifteenth day of July of each year. The 1947 act which repealed the prior statute fixed the closed season for the taking of salt water trout during the period between the twentieth day of May and the twentieth day of June, the effect of which was to advance the closed season about one month.

The intention of the Legislature to regulate the taking of a species of salt water fish may not be questioned, and the designation of the species as "salt water trout" clearly indicates the intent to be to refer to that species known to the industry as "speckled trout."

The question is accordingly answered in the affirmative.

March 17, 1948.—048-126.

#### SHRIMP—REGULATIONS

**QUESTION:** In the prosecution of violation of chapter 24268, acts of 1947, by having in possession shrimp of a lesser size than which count fifty-five to the pound with the heads off, is it necessary to allege that the shrimp were taken from the salt waters of the State of Florida?

*To Honorable Wayne E. Ripley, County Solicitor, Criminal Court of Record, Jacksonville, Florida:*

Chapter 24268 was enacted under the following title:

"An act regulating the taking of shrimp from the salt waters of the State of Florida; defining salt waters; prohibiting the taking of shrimp less than a minimum size; and fixing a penalty for the violation thereof."

Section 1 of the act provides:

"From and after the effective date of this Act it shall be unlawful for any person, firm, association or corporation, whether resident or nonresident, to take, by any means, method or device whatsoever, from the salt waters of the State of Florida, or to have in his or their possession, or to sell or offer for sale, any shrimp of a lesser size than which count fifty-five to the pound with their heads off."

Under the pronouncement of the decisions of the Supreme Court of Florida in *White v. State*, 93 Fla. 905, 113 So. 94; *Taylor v. Penton*, 99 Fla. 1067, 128 So. 499; unless there is an express provision in an act regulating fishing and the fishing industry, stating that it shall be applicable to fish taken from the waters of a foreign state, no such intention will be assumed.

Inspection of the title and the body of the subject statute brings the question squarely within the principle announced by the supreme court in *White v. Penton*, 110 So. 532, that the purpose of the statute was to regulate the taking of shrimp from the salt waters of the State of Florida, and to regulate the possession, sale or offer of sale of undersized shrimp taken from the salt waters of the State of Florida. It follows that the possession of shrimp which was not taken from such waters does not fall within the prohibition of the statute.

The question is accordingly answered affirmatively.



February 12, 1948.—048-56.

#### SEAFOOD DEALER—LICENSES—RETAIL AND WHOLESALE

**QUESTION:** Is a retail merchant who has paid the license fee imposed by law upon dealers in merchandise—who in addition to other food products, knowingly, customarily and in disregard of directions from an authorized conservation agent, deals in and sells salt water seafoods or other products to hotels, restaurants or other public eating places—required to secure a wholesale seafood dealer's license, if he has procured a retail seafood dealer's license under the provisions of section 374.31, Florida Statutes, 1941?

*To Honorable J. T. Hurst, Supervisor, State Board of Conservation:*

The question presented is related to questions upon which prior opinions have heretofore been rendered on February 5, 1941, and on January 8, 1942, respectively, both of which are now affirmed.

Under the terms of section 374.31, Florida Statutes, 1941, wherein "wholesale seafood dealer" and "retail seafood dealer" are defined, any person who sells seafood to a hotel, restaurant, or other public eating place, regardless of the means by which the product came into his hands for sale is required to secure a wholesale dealer's license.

Under the provisions of the quoted statute, a wholesale seafood dealer who sells to a consumer in addition to selling to retail dealers, restaurants, hotels and other public eating places, is required to secure both a wholesale and a retail dealer's license. Retail dealers who sell to consumers and also to restaurants, hotels and other public eating places are required to secure both a retail and a wholesale dealer's license.

The question is accordingly answered in the affirmative.

December 29, 1947.—047-420.

#### MULLET—POSSESSION OF ALABAMA MULLET—CLOSED SEASON ON MULLET

**QUESTION:** Do the provisions of chapter 24204, Laws of Florida, 1947, prohibit the possession, during the period of time therein prescribed, for the purpose of sale, of mullet taken from the waters of the State of Alabama and imported into the State of Florida?

*To Honorable J. T. Hurst, Supervisor, State Board of Conservation:*

Chapter 24204, Laws of Florida, 1947, is entitled "An act regulating the taking, possessing, buying, selling, or shipping fresh or freshly-salted mullet or mullet roe within the State of Florida." The Supreme Court of Florida has held that the Legislature may, in the exercise of the police powers of the state, prohibit the possession or sale during a prescribed period of time of fish of a stated size or species, even though such fish may be taken from the waters of a foreign state and imported into the State of Florida for the purpose of sale. The court has held, however, that it will not be assumed that such prohibition was within the legislative intent in the absence of an express intention to so do—same must clearly appear in the provisions of the applicable statute. There does not appear in the title or context of chapter 24204 anything to indicate legislative intent to regulate the possession or sale of mullet legally taken from the waters of a foreign state and imported into Florida. The Legislature is without power to prohibit the taking of mullet from the waters of a foreign state, and in the absence of an express prohibition against the possession of mullet taken from the waters of a foreign state, the statute must be interpreted to negative such intention.

Under the provisions of the cited statute, any regularly licensed seafood dealer in the State of Florida may have in his possession and may sell during the closed season mullet taken from the waters of Alabama and imported into the State of Florida.

December 18, 1947.—047-422.

#### SHRIMP BOATS—FOREIGN REGISTRY—NONRESIDENT BOATS

**QUESTION:** May South Carolina shrimp boats which are registered in South Carolina be registered also in the State of Georgia and come to Florida waters to take shrimp under the reciprocal agreement between Georgia and Florida and according to provisions of chapter 23777, acts of 1947?

*To Honorable J. T. Hurst, Supervisor, State Board of Conservation:*

Under the provisions of United States Statutes, no vessel may be registered, enrolled or licensed by the commissioner of navigation for more than one home port or in more than one navigation district.

Section 3, chapter 23777, Laws of Florida, 1947, prohibits the use of a nonresident boat for the purpose of taking or catching or assisting in the taking or catching of shrimp or prawn from the waters of the State of Florida except in cases where a reciprocal agreement exists between the State of Florida and the state which the owner of such nonresident boat is a resident.

A nonresident boat is defined by section 2, chapter 23777 to be any boat which has not been duly registered in the State of Florida for a period of one year prior to the date of application for license.

In the absence of a reciprocal agreement between the State of Florida and the State of South Carolina, under which the citizens of the State of Florida may be permitted to take or catch shrimp or prawn from the waters under the jurisdiction of another state in exchange for like privilege to take shrimp or prawn from the waters of the State of Florida by residents of the other state, a boat registered in the district of South Carolina may not be licensed to take shrimp from Florida waters. The question is accordingly answered in the negative.

September 22, 1947.—047-322.

#### NETS—MULLET AND MACKEREL—RETURN OF ILLEGAL FISH

**QUESTION:** Would a person violate the law when taking fish other than mullet or mackerel with a net of a length of more than three hundred fifty yards as referred to in section 374.36, Florida Statutes, 1941?

*To the State Board of Conservation, Honorable J. T. Hurst, Supervisor, Tallahassee, Florida:*

Section 374.36, Florida Statutes, 1941, prohibits the use of a net or seine of a length of more than three hundred fifty yards for the catching or taking of fish from any of the salt waters of the State of Florida, with an exception provided that nets or seines of a greater length than three hundred fifty yards may be used in the lawful taking of mullet and mackerel. The apparent purpose of the quoted section is the conservation and protection of salt water fish. The exception permitting the taking of mullet or mackerel by the use of seines of a greater length than that prescribed cannot be construed to permit the taking of any other species. It is the taking of salt water fish from the waters that is prohibited. To avoid violation of the law, any salt water fish other than mullet or mackerel caught in a net of more than three hundred fifty yards in length shall be immediately returned, while alive, to waters in which they are caught. The question is accordingly answered in the affirmative.

July 1, 1947.—047-179.

SHRIMP—LEGAL SIZE

QUESTION: Which law governs the legal size of shrimp to be taken from the salt waters of the State of Florida?

*To Honorable J. T. Hurst, Supervisor, State Board of Conservation:*

The general rule of statutory construction is that where there are two general statutes enacted during the same session of the Legislature and one of the statutes is repugnant to the other, the statute that became a law last in point of time will govern.

The provisions of chapter 24268, Laws of Florida, 1947, which became a law on June 16, 1947, will control the size of shrimp to be taken from the salt waters of Florida.

## CHAPTER XXIII

### PUBLIC HEALTH

#### STATE BOARD OF HEALTH

August 27, 1948.—048-283.

##### PLAINTIFF—COMMON LAW ACTIONS

**QUESTION:** Who should be named as plaintiff in a proposed action to recover damages to a motor vehicle operated by the State Board of Health, under title certificate and with tag issued to such board?

*To Honorable Philip S. May, Crawford & May, Lynch Building,  
Jacksonville, Florida:*

The State Board of Health was provided by the Legislature (present legislation found in chapter 381, Florida Statutes, 1941, as amended) in pursuance of the direction of article XV, section 1, Florida Constitution. The laws with respect to the board as created do not appear to make such board a body corporate or quasi-corporate; nor do I construe chapter 24169, Laws of Florida, acts of 1947, as investing the board with such character. There appears to be no specific provision with respect to actions by the board of the nature contemplated by the question. Certain doubt exists as to the name to be used as the plaintiff in such proposed action. However, it would seem to be the better general rule (see 59 C. J. 326, section 486), that since the state is the real party in interest, the plaintiff in such suit is, "The state of Florida for the use and benefit of ..... and ..... as and constituting the State Board of Health."

January 28, 1948.—048-28.

##### NEGLIGENCE—LIABILITY FOR TORT—MALARIAL CONTROL

**QUESTION:** What claims do private persons have against the State Board of Health for negligent application of DDT spray in the malarial control program of the United States Public Health Service?

*To Honorable Philip S. May, Crawford & May, Lynch Building,  
Jacksonville, Florida:*

As indicated in request for opinion, it appears that the conclusion of the general counsel for the United States Public Health Service is unsound. It seems to me that although the general rule is that where a servant of "A" performs some particular work for "B" and under the direct supervision and direction of "B", that "B" is then liable under the theory of respondent superior. In the present case all these facts do not appear. The crew leader was a federal employee and directly responsible to the project supervisor; the equipment was owned by the federal government and the materials supplied by the federal government. Although it appears that the selection of sites for activities was worked out by the State Board of Health in cooperation with the federal government, final approval was given by the federal government who, in turn, prescribed the broad policies of the project.

It is, therefore, my opinion that the Florida State Board of Health is not liable for the damages claimed.



March 14, 1947.—047-76.

#### SPECIAL FUND BALANCE—USE DURING YEAR

**QUESTION:** Is the State Board of Health authorized to use during this fiscal year the sum of \$11,646.71 representing a balance on hand from the annual half-mill levy heretofore provided by chapter 16179, Laws of Florida, acts of 1933?

*To Mr. F. B. Ragland, Director, Bureau of Finance and Accounts,  
Florida State Board of Health, Jacksonville, Florida:*

Said chapter 16179 provided for an annual state half-mill levy for a special fund for the maintenance and support of the State Board of Health, together with compensation and the necessary expenses of the state health officer and all officers and employees of said board, and all other necessary expenses of said board.

The amendment to article IX, section 2, Florida Constitution, adopted at the 1940 general election, provided that after December 31, 1940, no levy of ad valorem tax upon real or personal property except intangible property should be made for any state purpose whatsoever. It is assumed, of course, that the balance mentioned in the question, represents proceeds from annual levies authorized by said act and imposed prior to December 31, 1940. By implication, such amendment repealed chapter 16179, insofar as such law authorized the state levy provided therein. However, it does not appear that the amendment affected the appropriation found in the act.

In view of the foregoing, in my opinion the question is answered as follows:

The State Board of Health is authorized to use during this fiscal year such balance accumulated in the special fund provided by said chapter 16179 for the purposes set forth in said law, upon proper release of such funds by the Budget Commission.

May 14, 1948.—048-161.

#### GRANT OF FUNDS BY PRIVATE COMPANIES—USE OF PRIVATE FUNDS

**QUESTION:** Does the State Board of Health have the authority to accept a grant of funds from private phosphate companies, to be used exclusively for a detailed survey of the Peace-Alafia drainage basin extending over a length of time sufficient to develop all phases of pollution and sanitation problems in the basin with particular emphasis on the cause, effect and source of waste discharged by the several mining companies?

*To Dr. Wilson T. Sowder, State Health Officer, State Board of Health,  
Jacksonville, Florida:*

From the data furnished me it appears that there is a definite need for research and survey regarding the pollution of Peace river and Alafia river from the operation of phosphate companies in that district.

Section 381.43, Florida Statutes, 1941, provides in part:

"The state board of health or its duly accredited representative shall have general control and supervision over the underground water and all lakes, rivers, streams, canals, ditches and coastal waters under jurisdiction of the State of Florida, insofar as their pollution may affect the public health, impair the interest of the public, or of persons lawfully using the same."

It would therefore appear that such a program would properly be carried on by the State Board of Health as one of the purposes for which such board was created.

I find no provision under the laws of the State of Florida that directly prohibits the acceptance by the State Board of Health of gifts or grants to be used in a program for any of the purposes for which the State Board of Health was created.

Chapter 22746, Laws of Florida, 1945, provides:

"Section 1. The State Board of Health is hereby authorized and empowered, subject to the approval of the State Budget Commission, for and on behalf of the State of Florida to accept any funds or grants through appropriation by the Congress of the United States, or otherwise, and any supplies, equipment, goods or service available to the State of Florida for public health or related uses.

"Section 2. Any funds or grants received by the State Board of Health through appropriation by the Congress of the United States, or otherwise, shall be deposited in the State Treasury and shall be disbursed in the same manner as other State Board of Health funds, subject to the approval of the State Budget Commission."

A liberal construction of this act would authorize the State Board of Health for and on behalf of the State of Florida to accept such funds subject to the approval of the state budget commission to be deposited in the state treasury, earmarked for the purposes for which given, and disbursed in the same manner as other State Board of Health funds for those purposes.

It will be noted that the title to the act reads as follows: "... An Act to Provide for the Acceptance of Funds or Grants by the State Board of Health; to Provide for the Manner in Which Said Funds or Grants Shall be Disbursed."

It will also be noted that in the body of the act in referring to such funds or grants it is stated "... through appropriation by the Congress of the United States, or otherwise, ..."

I am, therefore, inclined to answer the question in the affirmative. At the same time I wish to call attention to the fact that it is possible that the courts, should they adopt a strict construction of this act, could confine the acceptance of such funds and grants only from the federal government. But, inasmuch as the effective date of such program is July 1, 1949, ample time is provided within which the Legislature of the State of Florida could specifically authorize the execution of such contract and the acceptance of such funds for the sole purposes of such survey and research.

July 18, 1947.—047-224.

#### REAL ESTATE—AUTHORITY TO ACQUIRE

QUESTION: What is the effect, if any, of the provisions of chapter 24169, Laws of Florida, acts of 1947, with respect to the conclusions set forth in opinion of this office dated May 31, 1947, No. 047-182, concerning the authority of the State Board of Health to acquire and convey real property?

*To Dr. Wilson T. Sowder, State Health Officer, State Board of Health, Jacksonville, Florida:*

It is pointed out that house bill No. 1209 is chapter 24169. The act was filed in the office of the secretary of state on June 16, 1947, and it was not considered when said opinion was prepared.

House bill No. 1209 as introduced was prepared by this office in pursuance of request of the state health officer; and it empowered the State Board of Health to acquire by purchase or donation, in its own name, real property, and to convey same as therein set forth, and it confirmed in the State Board of Health title to real property theretofore deeded to it, with power of sale, as aforesaid. Such bill passed the house as introduced, but was amended (as indicated in the next paragraph) in the Senate; and the bill, as amended, became a law.

Chapter 24169 provides that where heretofore attempts have been made to convey by deed to the State Board of Health any real property in this state, title to the real property described in any such deed is confirmed in the State Board of Health. That is the extent of the act as passed.

The aforementioned opinion involved six acres of land in Escambia county, Florida, acquired by the board many years ago by warranty deed; and the questions set forth in said opinion concerning said real property were as follows: (1) In whom is such title vested at this time? (2) May such title be conveyed at this time, and if so, by whom? (3) Granted that such title may be conveyed, would it be lawful to convey it without consideration to a private hospital corporation?

In view of chapter 24169, the answers given such questions in the aforesaid opinion are modified and changed as follows:

(1) Title to such land in pursuance of said chapter 24169 is vested in the State Board of Health.

(2) Since neither chapter 24169 nor any other law of Florida grants to said board power to convey real property, such land may not be conveyed by said board or any other department of the state for said board.

(3) In view of the second answer, *supra*, answer to the third question is unnecessary.

Opinion No. 047-182 is recalled and this opinion substituted in lieu thereof.

November 18, 1947.—047-380.

#### PROPERTY HELD BY BOARD—LIMITATIONS ON USE OF PROPERTY

QUESTIONS: 1. What procedure should be followed by the State Board of Health to remove the provisions of certain ordinances whereby the title to property deeded by the city reverts to the City of Pensacola in the event this board discontinues the use of said property?

2. Is it proper that the grantee in said deed be designated "State of Florida for the use and benefit of the Florida State Board of Health" as has been done, or should the State Board of Health be designated as the grantee?

3. Is it in order for said board to pay to the City of Pensacola the \$100.00 consideration provided by said deed?

*To Dr. Wilson T. Sowder, State Health Officer, State Board of Health, Jacksonville, Florida:*

The foregoing questions are answered in their numerical order as follows:

(1) The ordinance of the City of Pensacola passed on March 16, 1914, specifically repeals all ordinances and parts of ordinances in conflict therewith, with the result that the other ordinance appears to have been repealed. Since there is nothing in the record before me to show any ordinance adopted by said city subsequent to March 16, 1914, I shall assume for the purpose of this opinion that the latter ordinance is the only one in effect respecting the situation presented and that the same controls

insofar as such control is pertinent to a proper disposition of the foregoing questions.

Said ordinance provides, among other things, as follows:

"Section 1. That upon the payment of One Hundred (\$100.00) Dollars to the city by the State Board of Health, the commissioners of the City of Pensacola shall execute and deliver to the State Board of Health of the State of Florida, a deed conveying to the State of Florida for the use of said State Board of Health, the property of the City of Pensacola hereinabove described, to be used by said board for the erection and maintenance of a State Bacteriological Laboratory and such offices as it may maintain in the City of Pensacola, with provision for the reversion to the City of Pensacola of said property if said board shall within one year after the date of said deed, fail to erect on said property a Bacteriological Laboratory to cost not less than \$20,000.000, or whenever said property shall cease to be used for said purposes, provided, however, that such deed shall not be delivered to said board until after the State Board of Health shall have filed with the City Clerk a duly certified copy of a resolution adopted by said board accepting this ordinance, and agreeing to each and all the terms and conditions hereof."

It is my understanding that said deed, which does not in terms contain any reversion provision as required by said ordinance, has not been accepted. I do not know whether the board has previously adopted a resolution accepting said ordinance as provided thereby, but if it has not, it appears that compliance with the ordinance in this respect is necessary and that by such action the board has or will bind itself to accept the deed subject to the reversion provision. Therefore, it seems that the only way the City of Pensacola can make a conveyance which is not subject to the reversion provision is for the governing body of said city to adopt a new and appropriate ordinance so providing. And whether such governing body can authorize the execution of such a conveyance will depend, of course, upon whether it has that authority through its city charter.

(2) In view of the quoted provision of said ordinance the grantee in a deed executed pursuant thereto would have to be designated as has been done. As to whether the deed could be made to the State Board of Health (after the enactment of a proper ordinance), please see that part of my opinion dated May 31, 1947 (047-182), relative to the first subdivision of the question answered thereby. Chapter 24169 became a law on June 16, 1947 and relates to attempts "heretofore" made to convey property by deed to the State Board of Health. The deed here discussed is dated September 15, 1947. For these reasons, said chapter has no application to said deed.

(3) It seems to me that payment of the \$100.00 should be withheld until the uncertainties reflected under Question 1 have been set at rest. If I can be of assistance in this regard, please let me know and I shall be glad to do what I can.

May 17, 1948.—048-163.

#### DOG QUARANTINE—DUTY OF SHERIFF

QUESTION: "Does the sheriff of Leon county have the power and authority to summarily kill unconfined dogs found running at large within said county, the State Board of Health having quarantined said county because of the fear of spread of hydrophobia therein, and to effectuate said quarantine has ordered the killing of dogs found so running at large?"



*To H. A. Sauberli, M.D., Director, Leon County Health Unit,  
Tallahassee, Florida:*

Attention is called to section 381.17, Florida Statutes, 1941, providing in part:

"... provided, that in cases of hydrophobia, the state health officer may be represented by any authorized agent or agents of the state board of health, and said state health officer shall declare said infected point and animal or animals to be in quarantine, and place any and all such restrictions upon ingress and egress of animals or persons thereat as, in his judgment, shall be necessary to prevent a spread of the disease from the infected locality or animal or animals; and the state health officer, when he shall have declared any city, town or other place, or animals to be in quarantine, shall so control the population or animals of said city, town or other place, and make such disposition of the same as shall in his judgment appear best to protect that population and at the same time prevent a spread of the infection, or running at large of animals infected with rabies, among the same. The sheriff and constables of the several counties of this state, and the police officers of the cities and towns of this state, shall be under the control of the said state health officer to enforce and carry out any and all quarantine regulations that he may prescribe, which said regulations shall be immediately published in the most practicable manner in the several counties, cities, towns or other places where quarantine may be established; and said state health officer shall make immediate report of his actions and doings in the premises to the president of the board of health, and from time to time, so long as quarantine shall continue."

Attention is also called to section 381.49, Florida Statutes, 1941, providing in part:

"The state board of health may make, adopt, promulgate, enforce, and from time to time, amend, and repeal, rules and regulations covering sanitation and quarantine as may be necessary for the protection of the public health..."

I assume that it has been determined by the State Board of Health that a state of emergency does exist in the affected area, Leon county; that such quarantine is necessary to prevent the spread of the disease to protect the population and said board has ordered the killing of unconfined dogs found running at large within said area.

The power to enact laws to prevent the spread of infectious or contagious diseases among domestic animals is generally recognized as a proper exercise of the police power and particularly so when it tends to affect the life, health and property of human beings.

It is also unquestioned that the Legislature may delegate authority to a governmental agency to promulgate rules and regulations to effectuate the purposes of such as are essential to detect, control and suppress contagious and infectious diseases among domestic animals and particularly so when such diseases tend to affect the life, health and property of the inhabitants of the area or areas affected. Otherwise, the quarantine would be ineffectual.

It is my opinion that the State Board of Health has such power and the rules and regulations ordering summary destruction of such animals when found running at large in violation of such rules and regulations is a valid exercise of its powers under sections 381.17 and 381.49, Florida Statutes, 1941, as well as under the general police powers of the state.

In *Allison A. Walker, et al vs. Edward E. Towle*, 156 Ind. 639, 53 L. R. A. 749, the Supreme Court of Indiana held:

"It is settled in this state that municipal corporations having such powers may pass ordinances requiring owners of dogs to securely muzzle the same, or keep them upon their own premises, and directing the marshal to kill all dogs found running at large in violation of such ordinance, and that, if such officer kills a dog running at large in violation of such ordinance, no action can be sustained against him for such act."

In *Walker vs. Towle*, supra, it was provided that such ordinance should become effective upon proclamation by the mayor of the City of Hammond, Indiana, when the mayor determined that an emergency existed and that the operation of such ordinance was necessary to prevent the spread of hydrophobia. It was therein held that this was not a delegation of legislative powers by the municipality but that it was the mayor's imperative duty to issue such proclamation when such emergency was found to exist. See also the annotation in 8 A. L. R. 74, holding such statutes and ordinances to be a valid exercise of the police power.

Under the precise provision of section 381.17 above quoted, it becomes the duty of the sheriff or constable of the affected area and the police officers of any cities and towns of this state located within the affected area to enforce and carry out any and all such quarantine regulations as prescribed by the state health officer.

I therefore answer the question in the affirmative.

September 9, 1947.—047-309.

#### RACIAL SEGREGATION—FEDERAL HOSPITAL AUTHORITY— EFFECT OF SEGREGATION

**QUESTION:** May any or all services and/or facilities of a tax-supported hospital in this state be legally denied to a citizen of the political subdivision supporting such a hospital because of the race, creed, or color of a citizen?

*To Honorable C. H. Overman, Director, Florida Improvement Commission:*

The request for opinion of August 7, 1947, and the explanatory letter of August 26, 1947, in part, and in effect, set forth that the Florida State Improvement Commission, in connection with its duties in preparing the State Hospital Plan desires the question answered; that in formulating a plan for hospital construction which is expected to be projected over a period of years—since some of the hospitals that will be constructed under the plan will be tax-supported and since the population of Florida is composed of persons of more than one race, creed and color—it will be difficult to formulate such a plan or advise communities concerning their hospital construction problems unless the answer to such question is known.

The State Hospital Plan mentioned is the plan contemplated by the federal act whose short title is the "Hospital Survey and Construction Act" (see Title 42, sections 291-291m, U. S. C. A.), in connection with which, to assure for this state the benefits of such act, our Legislature enacted chapter 22851, Laws of Florida, acts of 1945, and chapter 24091, Laws of Florida, acts of 1947. By virtue of the provisions of the former state act and action by the governor, the Florida State Improvement Commission has been designated as the state agency for preparation of the plan contemplated by Title 42, section 291(a) and other pertinent provisions of the federal act as set forth in U. S. C. A. as mentioned.

The preparation of the State Hospital Plan and the requirements for such plan are controlled entirely by the federal act mentioned. The requirements for the state plan to be submitted are set forth with particularity in the federal act. When the plan has been completed and submitted, it must be approved by the federal officer named in the act.

Any question which might arise in connection with the preparation of the plan as to the hospital needs for any community, and any question which might arise as to whether or not the completed and submitted plan meets the requirements of the federal act; involves the construction and application of the federal act, and/or lawful regulations prescribed in pursuance thereof. Such question can be authoritatively answered only by the federal authorities charged with the administration of the act. However, I do refer to my opinion of November 1, 1946, No. 046-474, and the paragraph thereof which I quote as follows:

"In connection with my answers to the questions, it is considered proper to call to your attention that the federal act for this program vests in the surgeon general wide regulatory powers within the purview of the act (see section 622), and that acceptance of Federal funds under the act renders the State agency and political subdivisions or other constructing hospitals as contemplated by the program, subservient to the provision of the act and to such regulations as may properly be promulgated thereunder. Particular attention is directed to Section 622 (f) of the federal act, which would appear to contemplate the waiver of racial segregation as we observe it."

### BUREAU OF VITAL STATISTICS

July 21, 1948.—048-239.

#### MICROFILM—PERMANENT RECORDS

QUESTION: Has the Bureau of Vital Statistics authority to use microfilm as its permanent records of divorce and to destroy the originals?

*To Florida State Board of Health, Jacksonville, Florida:*

It will be noted that section 382.26, Florida Statutes, 1941, provides: "The records of marriages and divorces obtained under the provisions of sections 382.23 and 382.25 shall be compiled, kept and preserved as are other vital statistics under the provisions of this chapter."

Other provisions of chapter 382, Florida Statutes, 1941, provide that the Bureau of Vital Statistics "shall be properly equipped with fireproof vaults and filing cases for the permanent and safe preservation of all official records made and returned under this chapter."

Even though microfilming or photographic reproduction has proven a feasible and accepted method of keeping public records, I hesitate to advise that an agency can make such reproductions and destroy the originals without direct authority from the Legislature of the State of Florida. It is, therefore, my recommendation that at the next session of the Florida Legislature proper legislation be obtained for keeping microfilm records or photograph reproductions of original records and destroying such originals for space conservation.

The foregoing question is therefore answered in the negative.

June 17, 1948.—048-219.

#### BURIAL—REMOVAL—TRANSIT PERMITS—EMBALMER'S AFFIDAVITS—DESTRUCTION

QUESTIONS: 1. Do local registrars of vital statistics have the power and authority to destroy the burial-removal-transit permits and embalmer's affidavits required to be filed with them under the provisions of sections 382.14 and 470.23, respectively, Florida Statutes, 1941?

2. May local registrars forward embalmer's affidavits required under the provisions of section 470.23, Florida Statutes, 1941, to the State Board of Funeral Directors and Embalmers, to remain on file in that office?

*To Florida State Board of Health, Jacksonville, Florida:*

Section 382.14 provides in part that any person in charge of any premises on which interments, or other dispositions are made of human bodies "shall endorse upon the permit the date of interment, or other disposition, over his signature, and shall return all permits so endorsed to the local registrar of his district within ten days from the date of interment or other disposition."

The permit referred to is provided for in section 382.33, Florida Statutes, 1941, "If the certificate of death is properly executed and complete he shall then issue a burial, removal or other permit to the undertaker or the person acting as such."

Section 470.23, Florida Statutes, 1941, provides:

"Upon embalming a dead human body the embalmer shall forthwith file an affidavit with the local registrar of vital statistics in the county in which such embalming was performed, that he embalmed said dead human body or that said human body was embalmed under the direct supervision and control of said embalmer, that he (the said embalmer) was personally present during the embalming of said human body."

I do not think that it can be questioned but that the documents referred to are "public records." For instance, see 45 Am. Jur., page 420, section 2, which provides:

"It is said that a public record is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done."

Attention is called to the statement in 45 Am. Jur., page 425, section 12, which provides:

"Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made."

Section 119.01, Florida Statutes, 1941, specifically provides that all state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida and those in charge of such records shall not refuse this privilege to any citizen.

I, therefore, answer each of the questions posed in the negative as I find no provisions under the laws of the State of Florida providing for the destruction of burial-removal-transit permits and embalmer's affidavits. I find no provisions under the laws of the State of Florida for the filing of embalmer's affidavits with the State Board of Funeral Directors and Embalmers.

Several state boards have had legislation enacted providing for the destruction of records to save storage space by providing for photographic microfilming of such records as the permanent records of such boards.



May 2, 1947.—047-117.

#### PROXY MARRIAGE—RECORDING

**QUESTION:** Is an agreement between a man (residing in Belgium Congo) and a woman (residing in this state) to marry each other, and a power of attorney executed by the man appointing another man his attorney-in-fact and proxy to do and perform all acts and engage in such ceremonies as might be required to complete a marriage ceremony between such principal and said woman, entitled to be recorded in the marriage records of the Bureau of Vital Statistics?

*To Dr. Wilson T. Sowder, State Health Officer, State Board of Health, Jacksonville, Florida:*

It will be noted that the question is limited to the authority of the Bureau of Vital Statistics to record the papers described, and this opinion is conditioned on the assumption that these were the only papers sent to such bureau for recording.

Since it appears that the statutes contemplate that only marriage licenses issued, executed and recorded in the office of the county judge issuing the same may be recorded in the office of the Bureau of Vital Statistics, there seems to be no authority or duty for recording the described papers.

#### VENEREAL DISEASES

January 23, 1947.—047-20.

#### PERSONAL INFORMATION—PENALTY FOR DIVULGING

**QUESTION:** What is the effect of the wording in section 384.10, Florida Statutes, 1941, as amended, that "no clerk or officer of the State Board of Health shall give out any personal information as to such reported cases, except upon the demand of a judge of a court empowered to deal with the operation of this law"?

*To Dr. R. F. Sondag, Director, State Board of Health, Jacksonville, Florida:*

Chapter 384, Florida Statutes, 1941, as amended, deals with reports concerning, and the required treatment of, those persons suffering with venereal disease.

Immediately preceding the words quoted in the question, section 384.10 has a provision that all reports of cases of venereal disease shall be filed in a safe or some place of safekeeping in the office of the board and shall not be subject to public inspection.

Section 384.06, Florida Statutes, 1941, as amended, requires any physician or other person who makes a diagnosis in, or treats a case of, venereal disease, or any superintendent or manager of a hospital, dispensary or charitable or penal institution, in which there is a case of venereal disease, to report same to the board or to the local health officer who represents the board, and subsequently if a person so afflicted ceases to take treatment prior to his or her becoming cured or rendered non-infectious, such fact shall likewise be reported.

Other provisions of this chapter provide for quarantine and/or treatment of persons so infected at any state hospital operated for such purposes by the board, or otherwise, as in such provisions of law set forth.

It may be that the "reports of cases" and "reported cases" mentioned in section 384.10 are to be construed as referring to those reports and those cases contemplated by said section 384.06. However, in the absence

of court construction and in view of the apparent purpose of said section 384.10, it is felt that reasonably the "reports" therein referred to are to be construed as including clinical records pertaining to a person sent to such a state hospital.

It is recognized that the wording, "except upon the demand of a judge of a court empowered to deal with the operation of this law," as found in said section 384.10 and as set forth in the foregoing question, is not too clear as to meaning. It would appear, however, that the reasonable intent thereof is to restrict the furnishing of the information contemplated by said section 384.10 to those instances when, properly, it may be elicited upon an order of a judge of this state entered in a matter dealing with the operation of the law found in said chapter 384.

In view of the foregoing, in my opinion the question is properly answered as follows:

No clerk or officer of the State Board of Health is authorized to give out any personal information concerning the "reported cases" contemplated by the question, except upon an order of a judge of a Florida court, and then only in connection with a matter related to the operation of the laws found in said chapter 384. In the absence of a court construction of the effect and meaning of "reports of cases" and "reported cases," as found in said section 384.10, it would seem to be the better rule to construe such quoted words as embracing not only the reports required by said section 384.06, but also clinical records of persons who have been patients in a state hospital of the character mentioned.

The foregoing answer evidences that until there has been a court construction of the part of section 384.10 here considered, the effect and meaning of the words quoted in the question shall be controversial. Should any person maintaining a cause in another state desire to use as evidence therein any of such records mentioned herein, the question of the propriety thereof could be settled by a Florida court by use of depositions and proceedings to require answers thereto as found in sections 91.26 and 91.27, Florida Statutes, 1941.

## FLORIDA CRIPPLED CHILDREN'S COMMISSION

May 6, 1947.—047-126.

### DEFINITION OF CRIPPLE—ORTHOPEDIC

**QUESTION:** May the Florida Crippled Children's Commission accept child patients suffering only from hernia, rheumatic heart or brain tumor?

*To Dr. L. J. Graves, Acting Director of Services, Florida Crippled Children's Commission:*

Stated in different language, the inquiry presented is whether a child suffering only from any one or more of the three named conditions brings the child within the field of service of the Florida Crippled Children's Commission.

Section 391.01 of the statutes defines a crippled child as any person under the age of twenty-one years whose physical functions or movements are impaired by accident, diseases or congenital deformity. Standing alone, that definition would be broad enough to cover a child suffering from the conditions named in the question; but the section must be considered in connection with the whole act, that is, chapter 391, in determining the intentions of the Legislature.

The duties of the Florida Crippled Children's Commission are set up in sections 391.05 to 391.08, inclusive. Section 391.05 requires the establishment of orthopedic centers and authorizes payment of costs of such

orthopedic centers. Section 391.06 authorizes employment of orthopedic surgeons and sets up qualifications for such orthopedic surgeons. Section 391.08 authorizes organization of public clinics under the direction of orthopedic surgeons.

From a study of the whole act, I am convinced that it was the intention of the Legislature to limit the Florida Crippled Children's Commission to children with an orthopedic condition.

May 12, 1947.—047-131.

#### TYPES OF INJURY—DEFECTIVE SPEECH

QUESTION: Would a child suffering from defective speech come within the purview of chapter 391, Florida Statutes, 1941?

*To Dr. L. J. Graves, Acting Director of Services, Florida Crippled Children's Commission:*

On May 6, I rendered an opinion with reference to the type of children who might be accepted as patients by the Florida Crippled Children's Commission. In that opinion I reached the conclusion that notwithstanding section 391.01, it was the intention of the Legislature to limit the Florida Crippled Children's Commission to children with an orthopedic condition. For the reasons set out in that opinion the question is answered in the negative.

#### FLORIDA STATE HOSPITAL

June 17, 1948.—048-200.

#### RESIDENCE PRIOR TO INSANITY—ADMISSION TO FLORIDA HOSPITAL

QUESTION: May an alien person, who has resided in this state more than ten years last past, if adjudged insane, be committed to Florida State Hospital, in view of the provisions of section 394.27, Florida Statutes, 1941, granted that under the applicable law otherwise the person's condition is such as to warrant confinement in said institution?

*To Honorable J. E. Straughn, Secretary, Board of Commissioners of State Institutions:*

This question was squarely dealt with in opinion No. 044-164. Biennial Report of Attorney General, 1943-1944, page 359. Such opinion, however, is subject to the following qualifying remarks.

While opinion No. 044-164 does not evidence it, the person therein concerned had been a resident of Florida prior to the time he became insane. The information which accompanied this request for opinion states that the person here involved has been adjudged insane and that "the county has cared for her ten years."

It is to be noted that under the general rule an insane person has not the power to elect a place of residence. If the unfortunate woman here involved has been insane ever since she came to Florida, she would never have been in a mental condition necessary for her to elect Florida as a place of residence; hence, she would not meet the residence requirements of section 394.27.

However, if prior to the time she became insane she located and resided in Florida and has continued to reside in Florida since becoming such resident, in my opinion the conclusion reached in opinion No. 044-164 applies to her case, and in such event the question is properly answered in the affirmative.

May 7, 1947.—047-124.

#### RESIDENCE—EVIDENCE OF INTENT

**QUESTION:** An unmarried woman, native of South Carolina, for a number of years (not less than ten), immediately prior to, on, or about, August 31, 1944, was a legal resident of Osceola county, Florida, and on or about such date was removed from Florida to North Carolina by her brother and there placed in a private sanitorium for treatment for mental illness. She was discharged from such institution on April 22, 1945, lived in North Carolina with members of her family until sometime in 1946, when she was committed as an emergency mental patient to a state institution in North Carolina, apparently under a provision of law of that state which permitted her acceptance by such institution as an emergency case. She is now in said institution, and it is desired by the North Carolina authorities to transfer her to Florida State Hospital as a Florida resident. Properly, may she be committed to Florida State Hospital as a "bona fide" resident of the State of Florida continuously for one year preceding the examination contemplated by section 394.27, Florida Statutes, 1941?

*To Mr. J. H. Therrell, Superintendent, Florida State Hospital,  
Chattahoochee, Florida:*

The foregoing facts have been gathered from copies of the correspondence which accompanied the request for this opinion. Additional facts are required to determine the question, as indicated hereinafter.

Heretofore, this office has held that "bona fide" residence as contemplated by said section 394.27 means "legal residence" (attorney general's opinion No. 044-164) and, further, that such words contemplated actual residence in Florida for such period of time required by this statute, as distinguished from constructive residence, as that of a wife (attorney general's opinion No. 045-400) or a child (attorney general's opinion No. 046-244). However, the last two mentioned opinions dealt with facts and particular situations therein found, and are not to be accepted as necessarily controlling in the case of a long-time resident of the state, temporarily absent from the state for business or other reasons or because of circumstances beyond such person's control.

It is recognized, of course, that to establish residence there must be an evidenced intent to do so, and there must be the mental capacity to make such determination.

In view of the foregoing, in my opinion the question is properly answered as follows:

This person is a "bona fide" resident of Florida for the time and within the meaning of said section 394.27 if the following facts exist:

(1) That her mental condition has been such for the period since her removal from Florida as to render her incapable of electing to change her residence from Florida to North Carolina; or

(2) That since she departed from Florida she has not elected to change her residence to North Carolina, granted that during such period she has been mentally capable at any time of making such an election.

It is recognized that the question of residence or domicile and the determination thereof involve technical considerations and must depend upon the facts of each case. However, it is scarcely contemplated that from a practical standpoint the nicety employed and required when the question involves rights of individuals, property rights, tax liability, franchise, etc., is to be invoked in a case of this kind.

Hence, it is suggested that the superintendent of Florida State Hospital request the North Carolina authorities to make further investigation and report concerning the matters contemplated by paragraphs (1) and (2) aforementioned; and if the facts of their further report, as measured



against the matters set forth in paragraphs (1) and (2), *supra*, reasonably satisfy the superintendent that this person has not lost her Florida residence, he may determine and conclude that she is a "bona fide" resident within the meaning of said section 394.27, and as such entitled to hospitalization in the Florida institution.

June 2, 1947.—047-151.

#### ADMISSION OF RESIDENT—ALIEN—SENILITY

**QUESTION:** Is an insane alien (native of Scotland), who has been a resident of a county in Florida for the last past twenty-odd years a "bona fide resident of the State of Florida continuously for one year" as such words are used in section 394.27, Florida Statutes, 1941, and as such, eligible to be committed to and received at Florida State Hospital upon proper proceedings and determination that he is suffering with senile dementia?

*To Dr. J. H. Therrell, Superintendent, Florida State Hospital,  
Chattahoochee, Florida:*

In an opinion of this office dated June 8, 1944 (No. 044-164), it was held that the "bona fide" residence contemplated by said section 394.27 meant "legal residence"; that "legal residence" or domicile could be acquired by one coming to this state with intent of permanently remaining here; and that such term "bona fide resident" is not necessarily synonymous with "citizen."

In my opinion the question is properly answered as follows:

(1) If this man established his permanent home and domicile in the aforesaid county and has lived in such county in excess of twenty years last past, and now resides there, he is a "bona fide resident" within the meaning of section 394.27, and from the standpoint of residence may be committed to the aforesaid institution.

(2) Section 394.26, Florida Statutes, 1941, provides in part, that a person may not be committed to the institution by reason of "senility" alone. It would seem to be the intent and effect of section 394.22 (3), Florida Statutes, 1941, as amended, that when a person has been adjudged insane, he may be committed to, and received at, the institution when such person requires confinement or restraint to prevent self-injury or violence to others or if treatment at the institution is necessary or would be of benefit to such person. It would seem that "senility" and "senile dementia" are not necessarily synonymous; but such differences as may exist are matters more properly lying in the province and knowledge of authorities at the institution rather than of this office. Whether, after appropriate proceedings and determination of mental incompetence, a person suffering with senile dementia may be committed to the institution would seem to depend upon his condition as measured against the requirements of said amended section 394.22 (3).

August 5, 1948.—048-260.

#### FEE—COUNTY JUDGE—INSANITY CASES

**QUESTION:** What is the fee allowed now for the county judge where it is sought to have a person adjudicated to be mentally incapacitated?

*To Honorable Curtis D. Earp, Judge of the County Court, Madison,  
Florida:*

Chapter 20504, paragraph 2, Laws of Florida, 1941, fixes the fee of county judge at \$2.00 for each of said cases. This was amended by chapter 23157, Laws of Florida, 1945, so that now the fee of a county judge is the sum of \$7.50 for each said case.

February 4, 1948.—048-39.

ESCAPED INSANE INMATE—CONVICTED OF CRIME—PARDON—  
PAROLE

**QUESTION:** Where a person is committed, by a proceeding in the county judge's court, to the Florida State Hospital as insane, and subsequently escapes or is released on parole or otherwise, and while out of the hospital commits some crime for which he is indicted, arraigned and pleads guilty, without the court's being in any way advised of such former adjudication of insanity, may the conviction and sentence of such person be impeached because of such prior adjudication of insanity?

*To Honorable Nathan Mayo, Commissioner of Agriculture, Prison Division:*

The particular inmate involved was received at the State Prison Farm from Hillsborough county on May 27, 1935, under a twenty-five year sentence. Judgment having been entered in a criminal case consequent upon his plea of guilty to charges made against him. Prior to that time he was tried he was a patient at Florida State Hospital; and at the time of his trial was under a commitment of insanity to said institution. Shortly after he was received at the prison farm, he was transferred to the hospital, and has been detained in the latter place since that time in the building wherein are kept the criminally insane. According to the letter from the superintendent of the hospital to the commissioner of agriculture, the inmate has been checked several times by the staff, but it appears they would not be willing to recommend release from the hospital, even were the inmate relieved of the effects of the sentence under which he is detained.

As a general rule when a person is adjudged to be insane by a court of competent jurisdiction a presumption of insanity continues until it is established by competent evidence that sanity has returned; however, this presumption is not a conclusive one but may be rebutted by sufficient proof of sanity at the time of the commission of a crime or at the time of trial (*Acree vs. State*, 153 Fla. 561, 15 So. 2d 262, text 265; *Corbin vs. State*, 129 Fla. 421, 176 So. 435, text 436; *Deebs vs. State*, 118 Fla. 88, 158 So. 880; *State ex rel Deebs vs. Campbell*, 123 Fla. 849, 167 So. 805, text 806). The rule at common law is well settled that a person while insane may not be tried and sentenced; it being obvious that if a person is tried while insane, his insanity may disable him from making a rational defense (*State vs. Fabisinski*, 111 Fla. 454, 152 So. 207, text 211). The fact that a person, in a proceeding to determine his sanity or insanity, is determined to be insane and committed to an institution, "in no wise determines vel non the legal incapacity of . . . (such person) . . . to plead to the indictment or prepare his defense" when charged with commission of the crime (*State vs. Fabisinski*, supra). Although a person may be adjudged insane prior to the commission by him of a crime, the fact of such adjudication will not prevent him from being tried for such crime if the court finds that he was sane when the crime was committed and when the trial is held (*Acree v. State*, supra).

It appears from the foregoing, therefore, that in an instance of this kind, when the fact of a prior adjudication of insanity of a defendant has been brought to the attention of the court it is the duty of the court to investigate and determine the question of the sanity of the defendant; however, the fact of such prior adjudication of insanity under the facts assumed in the question would not seem to render the conviction and sentence in the case void ab initio.

In view of the foregoing, in my opinion the question is answered as follows:

This person may not be paroled, insofar as his sentence is concerned, since he is not mentally competent to agree to undertaking incident to

release of a prisoner under parole. The State Board of Pardons, if it saw fit, could issue him a pardon.

The remarks in this paragraph are subject to those in the immediately succeeding paragraph hereof. Although writs of error coram nobis, motions for new trial, motions in arrest of judgment, appeals and habeas corpus have been used as a remedy by persons convicted of crime while insane (Annotations 10 A. L. R. 213 and 121 A. L. R. 267), in this case the time for a motion for a new trial, in arrest of judgment or for taking an appeal has long since expired. Some courts have held that where, after the expiration of a term of court, it appears that the accused was insane at the time of trial, which fact was not then known to the court, that a writ of error coram nobis may be used to set aside and vacate the judgment (24 C. J. S. 149, Sec. 1606; Annotations in 10 A. L. R. 214 and 121 A. L. R. 268). I am of the opinion that this is the proper way to determine the validity of the conviction and sentence in this case at this time. The fact that the defendant had been committed to the state hospital under a commitment from a county judge's court did not prevent his being subsequently committed from a criminal court, for which reason the defendant is now held under both commitments and can only be released according to law.

The aforementioned question, discussion and conclusions assume that at the time of this person's trial the court was not advised of the defendant's prior adjudication of insanity. An investigation of the Hillsborough county records may evidence that such adjudication was known to the court at the time of the trial, and that the court conducted such investigation as contemplated by law concerning the defendant's sanity. In such event, only the Board of Pardons could relieve this person of the judgment entered against him in the criminal case.

As indicated, even though this person were relieved of the criminal judgment, his condition is such that he should not be released from the institution.

October 28, 1947.—047-370.

#### ACCEPTANCE OF FEDERAL LANDS—DORR AND CARLSTROM FIELDS

**QUESTION:** Does the State of Florida have the power and authority to accept the purported conveyances of Dorr and Carlstrom Fields, near Arcadia, Florida, from the Federal Works Agency, subject to the conditions mentioned in the said purported conveyances?

*To Federal Works Agency, Public Buildings Administration, Atlanta, Georgia:*

This opinion must of necessity be confined to said purported conveyances without change unless herein suggested. It appears that the property in question is to be used in place as and for a mental hospital branch of the Florida State Hospital for a period of at least ten years. The Florida State Hospital is under the management and control of the Board of Commissioners of State Institutions (section 394.02, Florida Statutes, 1941), who are authorized to operate a branch hospital on said Dorr and Carlstrom Fields (section 394.01, Florida Statutes, 1941, as amended by chapter 23800, Laws of Florida, acts of 1947). The acquisition of Dorr and Carlstrom Fields for the foregoing purpose was approved by the Legislature in the last above enactment.

Under section 218.07 et seq., Cumulative Supplement to Florida Statutes, 1941, the state and its boards, officers and agencies are expressly authorized to acquire surplus properties from the federal government and its agencies (section 218.07) which boards, officers and agencies are authorized to designate, "by appropriate resolution or order, any officer, employee or agency" to complete the purchase of such properties (section

218.06), without compliance with the laws relating to notice, bidding, etc., generally (section 218.09). These statutes expressly recognize the federal surplus property laws under which the purchases are to be made and seem to contemplate that all purchases thereunder may be subject to the terms and conditions of such laws (section 218.07). I am presuming that the conditions subsequent, mentioned on page three of the proposed deeds are authorized and within the provisions of the federal surplus properties laws.

Pursuant to the foregoing observations it seems that the State of Florida, through the Board of Commissioners of State Institutions, has the power and authority to accept the purported conveyances of Dorr and Carlstrom Fields, near Arcadia, Florida, subject to the three conditions mentioned therein.

February 12, 1948.—048-51.

JIM WOODRUFF DAM—OPTION TO PURCHASE LAND—U. S.  
GOVERNMENT

QUESTIONS: 1. Properly, should the Board of Commissioners of State Institutions execute an option granting to the United States the right to purchase certain land, and agree therein to execute a warranty deed covering said land if such option is exercised?

2. Should the board incorporate in said option the provision that, if the option is exercised, the board shall, in addition to conveying full title to the lands involved, quitclaim to the United States and its assigns all rights, title or interest which the board may have in the banks, beds and waters of any stream opposite to or fronting upon said lands, and in any alleys, roads, streets, ways, strips, gores or railroad rights of way abutting or adjoining said lands?

*To Honorable J. E. Straughn, Secretary, Board of Commissioners of State Institutions:*

The option presented with the request for opinion was prepared by the Board of Commissioners of State Institutions for sale of certain lands therein described to the United States, said lands being located in the 21st district, Decatur county, Georgia, containing 28.35 acres, more or less. It is indicated that advice is sought only as to whether the instrument is sufficient in form and content to grant to the United States the option contemplated thereby. If opinion or advice is desired on any other phase of the transaction, I shall be glad to comply promptly with request therefor. It is assumed that the land involved here is a part of the land held for the use of the Florida State Hospital.

The instrument as prepared is approved, subject to the following comments:

(1) Under the provisions of paragraph numbered (1) of the option, it is provided that the board shall execute and deliver to the United States "a good and sufficient general warranty deed conveying said land," etc., subject to the proviso, "that conveyances by states, municipal corporations, fiduciaries and persons acting solely in a representative capacity need not contain general warranty covenants if otherwise acceptable and satisfactory to the United States." Doubt exists as to the state's right to give a warranty deed, since there is involved an obligation to pay a possible sum of money in the future. The proviso quoted does not clearly remove this doubtful provision. As to the character of deed to be executed, it is suggested that the promise of the board to furnish deed be limited to a good and sufficient deed, without warranty. By the same reasoning, it is further suggested that the wording at the conclusion of the first paragraph of the instrument (unnumbered), namely, "a valid, indefeasible fee simple title



to said land" should be changed to read "all the title of the State of Florida," or words of similar import.

(2) It is noted that paragraph (1) further provides that in addition to conveying full title to said land, the board is required to "quitclaim to the United States and its assigns all right, title or interest which the vendor may have in the banks, beds and waters of any streams opposite to or fronting upon said land, and in any alleys, roads, streets, ways, strips, gores or railroad rights of way abutting or adjoining said land." I do not have a map showing the location of the land here involved, but if its location is such as to involve any right or title of the board in or to any of the properties covered by such quitclaim feature, it is suggested that the option should specifically describe the property and rights involved. This feature of the contract is not mentioned because of any legal insufficiency, but for the purpose of being sure that the board is acquainted with this possible coverage of the option, and that it is the intention to convey any such possible rights under the said quitclaim feature.

(3) Attention is directed to the fact of said board that the instrument must bear the impression of the seal of the department of agriculture, attested by the commissioner of agriculture.

December 19, 1947.—047-413.

#### JUVENILE INSANE PERSON—CONFINEMENT OF JUVENILE

QUESTION: An insane colored boy, twelve years of age, is now detained in the Broward county jail, and in order to prevent self-injury he is kept bound in his cell. May this person be committed to Florida State Hospital, in view of the provisions of section 394.24, Florida Statutes, 1941?

*To Honorable J. E. Straughn, Secretary, Board of Commissioners of State Institutions:*

Pertinent facts set forth in the letter of Mr. S. L. Waters, chief clerk, prison division, supplemented by his oral statements, are, in effect as follows: This boy is insane, and for the last two or three years his grandmother, who raised him, has been required to keep him chained; he is now "chained in his cell" in the Broward county jail, in order to prevent self-injury, and is confined there only because there is no other place to keep him. Since he is only twelve years old, question has been raised concerning his acceptance at Florida State Hospital. I assume the foregoing remarks are facts in this case concerning this boy, and also that the financial condition of his people is such that he would be considered an indigent insane person; and this opinion is conditioned upon such assumption.

It is a principle of our system of government, coming from the common law, that the state is primarily concerned for the care of its insane persons and their possessions. Article XIII, section 3, of the Constitution of Florida recognized this responsibility in the provision that "institutions for the insane . . . shall be fostered and supported by the state, subject to such regulations as may be prescribed by law." The supreme court of Florida has referred to insane persons as wards of the state (e. g., *American Surety Co. of N. Y. vs. Andrews*, 152 Fla. 638, 12 So. 2d. 599; *First National Bank vs. McDonald*, 100 Fla. 675, 130 So. 596), and has announced that the state is under special duty to protect them (*Ex parte Hanson*, 120 Fla. 333, 162 So. 715). In view of this traditional principle and the aforementioned constitutional provision, it would appear that it was never contemplated that counties should be forced to establish institutions for the humane care and treatment of indigent insane persons, or be required to defray cost of their care and treatment in a private institution.

Section 394.24, Florida Statutes, 1941, provides that, "No person under the age of fifteen years shall be committed to Florida State Hospital

except by transfer from another state institution of the State of Florida, who, following the commitment of such person to such other state institution, has actually been found to be insane."

If this boy is insane, he could not be committed to Florida Farm Colony (section 393.11, Florida Statutes, 1941). He may not be handled as a "delinquent child" (section 415.01 (2), Florida Statutes, 1941, as amended). His mental state and his home conditions might be such as to bring him within the definition of a "dependent child" (section 415.01 (1), Florida Statutes, 1941, as amended). It is recognized that there are circumstances under which a boy who is a "dependent child" may be committed to Florida Industrial School for Boys (section 415.17, Florida Statutes, 1941). However, certainly it is not contemplated that an insane boy should be committed to that institution; nor do the reasonable intent and effect of the provisions in section 394.24 contemplate that an insane boy may be dealt with as a "dependant child" solely for the purpose of using such institution as a conduit for his quick lodgement in Florida State Hospital.

The reason for the provision in said section 394.24 fixing the minimum age for admission to the institution at fifteen years is not stated. The apparent reason for such a condition would seem to be that ordinarily insane persons of tender years may be cared for adequately in their own homes. But the very fact that it has become necessary to detain this boy in jail and to keep him chained would indicate that he cannot receive proper care in his home. As an insane person he is a ward of the state just as much so as though he were fifteen; and if he is indigent, the state is as responsible for his care as though he were fifteen. In construing and applying such age limitation, it should be done so as not to offend the constitutional guaranty of equal protection of the laws; and the part of said article XIII, section 3, as quoted herein is to be viewed in the light of its reasonable intent.

In view of the foregoing and the circumstances of this individual case, in my opinion the question is properly answered as follows:

Florida State Hospital is the only institution of the state for the care and treatment of the indigent insane. If the conditions in this boy's home are such that he cannot be cared for there in a humane manner, it would seem that the aforesaid provision of section 394.24 should not be construed as applying to this case and should yield to the emergency situation here presented, the humane principles involved, and the duty of the state to care for the indigent insane. Hence, I recommend that in the event this boy has been or may be regularly adjudged insane, and that under the law, with the exception of the aforesaid provisions of said section 394.24, he may be committed to Florida State Hospital and that the superintendent of said institution be authorized to accept him there upon receipt of proper commitment.

This opinion is not to be construed as general in its application, but is limited to the circumstances of this particular case.

## TUBERCULOSIS SANITORIUM

July 27, 1948.—048-252.

### INDIGENT PATIENTS—COUNTY FUNDS—STATE'S SHARE

QUESTION: May the State Board of Health receive funds from the Pinellas County Board of County Commissioners in payment for indigent patients, from that county, to be admitted to the state tuberculosis sanatorium? May these funds then be deposited, by the State Board of Health with the state treasurer to the credit of the Pinellas County Health Unit Fund, to be drawn against by the State Board of Health, payable to

the Florida State Tuberculosis Board in payment for the county's liability for indigent patients, as billed by the Florida State Tuberculosis Board?

*To Honorable Fred B. Ragland, Director, Bureau of Finance and Accounts, Florida State Board of Health, Jacksonville, Florida:*

I assume from the question that the funds under consideration were not raised pursuant to section 154.02, Florida Statutes, 1941, but were raised otherwise and were for the purposes as set forth in chapter 392, Florida Statutes, 1941.

Section 392.10, Florida Statutes, 1941, in part, reads as follows:

"... All moneys required to be paid by the several counties and patients for the care and maintenance of patients in the sanatoria or while being treated by the out-patient department, shall be paid to the state tuberculosis board, and said board shall forthwith transmit the same to the treasurer of the State of Florida. All such moneys shall be placed to the credit of the board ... All moneys placed to the credit of the state tuberculosis board, including any earned surplus which has accrued, or may hereafter accrue, to the sanatorium maintenance account, shall be placed in a separate fund and shall be disbursed as provided in 392.13."

My opinion, therefore, is that the question should be answered in the negative.

April 22, 1948.—048-138.

#### HOSPITALIZATION NOT COMPULSORY—TUBERCULOSIS PATIENT

QUESTION: Do the laws of the State of Florida provide for compulsory hospitalization of a person diagnosed as having tuberculosis?

*To Mr. L. L. Lanier, General Business Manager, Tuberculosis Board, State of Florida, Orlando, Florida:*

I find no provision under the laws of the State of Florida making hospitalization compulsory as to any person diagnosed as having tuberculosis. The question must therefore be answered in the negative.

July 13, 1948.—048-230.

#### TUBERCULOSIS—COMMUNICABLE STAGE—ISOLATION

QUESTION: Does the Florida State Board of Health have the authority to enter an order for the compulsory isolation of a person afflicted with tuberculosis when such affliction is in a communicable stage?

*To Florida State Board of Health, Jacksonville, Florida:*

Section 381.49, Florida Statutes, 1941, provides:

"The State Board of Health may make, adopt, promulgate, enforce, and from time to time, amend and repeal, rules and regulations covering sanitation and quarantine as may be necessary for the protection of the public. The regulation so established shall be called and known as the sanitary code of the state of Florida. The sanitary code may deal with any matters affecting the security of life or health or the preservation and improvement of public health in the state of Florida."

Attention is also called to section 381.51, Florida Statutes, 1941, providing, "The sanitary code may provide for the care, segregation, and isolation of persons having, or suspected of having, any communicable contagious, or infectious disease; . . ."

It is almost universally held that the health departments of the various states of necessity have broad powers in the protection of the public health and in the segregation, isolation or quarantine of persons with communicable, contagious, or infectious diseases. (See 25 Am. Jur., pages 285-321, 29 C. J. 239-271, and 12 R. C. L., 1263-1292.)

It is noted that the sanitary code provides under regulation 3 that tuberculosis is a communicable disease and specifically listed as such and a minimum period of communicability is declared to be as long as specific organisms are discharged in the sputum.

Under the specific delegation of powers by sections 381.49 and 381.51, supra, it is my opinion that the State Board of Health has ample authority to order the quarantine or isolation of any person afflicted with tuberculosis in a communicable stage, as provided under regulation 3 of the sanitary code. Such isolation must of necessity be reasonable and impartial, for I am of the opinion that a person so afflicted may not be forced into isolation or quarantine in any particular place or institution so long as the isolation order is complied with and the person is so isolated as to prevent the spread of such disease to other human beings. Attention is specifically called to the fact that any person who feels that his personal liberty is being unduly interfered with and that his restraint through quarantine or isolation is illegal, has recourse to the courts in a habeas corpus proceeding for a judicial determination thereof.

When such order of quarantine or isolation is made by the State Board of Health, after it has been determined the person involved is so afflicted and that the disease is in a communicable stage, such order is enforceable by the State Board of Health either through its local health officials or, as provided in section 381.56, Florida Statutes, 1941, "other appropriate local officials." Should a patient persist in defying such order of isolation, the board may enforce compliance by appropriate court proceedings. In *Varholy vs. Sweat, Sheriff*, 15 So. 2d. 267, decided by the Supreme Court of Florida in 1943, the court held the sheriff of Duval county to be fully authorized to retain in custody a person placed under quarantine by the State Board of Health. In this case the Florida Supreme Court cited with approval the following statement taken from 12 Ruling Case Law, page 1271.

"Health regulations are of the utmost consequence to the general welfare, and, if they be reasonable, impartial, and not against the public policy of the state, they must be submitted to by individuals for the good of the public."

It will further be noted that section 381.58, Florida Statutes, 1941, provides that any person who shall violate, disobey, refuse, omit or neglect to comply with any of the rules and regulations of the sanitary code shall be guilty of a misdemeanor and subject to imprisonment not exceeding six months or a fine not exceeding one thousand dollars.

The question is therefore answered in the affirmative, subject to the limitations embraced within the purview of this opinion.

February 11, 1947.—047-38.

#### POWERS OF BOARD—LAND CONTRACT

QUESTION: "May the State Tuberculosis Board purchase property when there is a proviso in the deed which provides that if the State Tuberculosis Board should fail to keep and observe all the covenants in the deed (namely, that the property shall be used exclusively for health purposes for a period of five years from date thereof), the grantor shall have an absolute right to declare a forfeiture of the title with right of re-entry?"

*To the State Tuberculosis Board, Orlando, Florida:*

Section 392.02, Florida Statutes, 1941, provides and defines the powers and duties of the board. Said section provides that the board shall have



the power to contract and be contracted with; sue and be sued; to receive donations and bequests and to make purchases of lands and tenements and contract for the sale and disposal of same and shall have and possess all the powers of a body corporate for all of the purposes created by or that may exist under the provisions of chapter 392, Florida Statutes, 1941.

In my opinion the powers granted to the board are adequate for it to enter into such a proposed purchase with a deed containing such covenants.

May 11, 1948.—048-160.

#### OATHS—NARCOTIC OFFICERS, AGENTS, INSPECTORS

QUESTION: Is a clerk or stenographer in the central office of the Bureau of Narcotics in Jacksonville entitled under section 398.18, Florida Statutes, 1941, as amended, to administer oaths in connection with his official duties?

*To M. H. Doss, Director, State Bureau of Narcotics, Florida State Board of Health, Jacksonville, Florida:*

Section 398.18, Florida Statutes, 1941, as amended, provides:

"(5) All narcotic officers, agents and inspectors shall have authority to administer oaths in connection with their official duties, and any person making a false statement under oath before such officers, agents, inspectors and representatives of the state board of health shall be deemed guilty of perjury and subject to the same punishment as prescribed for perjury. The bureau of narcotics of the state board of health shall adopt a seal which shall be used on any and all papers and documents of an official nature."

Your attention is also called to the provision of section 398.21, Florida Statutes, 1941, providing in part:

"... All officers, agents, inspectors, and representatives of the state board of health engaged in the enforcement of the provisions of this chapter, shall in addition to their respective positions be designated as 'state police' and shall have the same authority as a deputy sheriff, to bear arms concealed or otherwise, and to make searches, seizures, and to arrest with or without warrants for any violation of the provisions of this chapter, and any other laws of the State of Florida; provided, however, that such officers, agents, inspectors, and representatives, shall first furnish a bond of not less than one thousand dollars approved by the state board of health, and made payable to the governor of this state."

I am forced to answer the question in the negative in view of the fact that neither a clerk nor a stenographer could be reasonably considered an "agent, officer or inspector" under the provisions of the uniform narcotic drug law of the State of Florida, being chapter 398, Florida Statutes, 1941, as amended.

## CHAPTER XXIV

### SOCIAL WELFARE

#### STATE BOARD OF PUBLIC WELFARE

October 24, 1947.—047-362.

#### COUNCIL FOR BLIND—POWERS OF COUNCIL—RIGHTS OF BLIND PERSONS

QUESTIONS: 1. May the Florida Council for the Blind borrow money for the purpose of expanding its aid-to-the-blind program, using as security for the loan the vending stands which it has heretofore established under the provisions of chapter 22681, Laws of Florida, 1945 (section 409.27-1, Florida Statutes, 1941, as amended)?

2. Are blind operators of vending stands within the classification of state employees entitled to participate in the benefits of state officers and employees' retirement system created by chapter 121, Florida Statutes, 1941, as amended.

3. May the Florida Council for the Blind install and operate vending machines in public buildings where there are no vending stands operated by blind persons.

*To Honorable M. Robert Barnett, Executive Director, Florida Council for the Blind, Tampa, Florida:*

In my opinion, all three of the questions should be answered in the negative. They are answered in their numbered order as follows:

(1) The council, as an "independent administrative governing board," is a division of services for the blind under the State Welfare Board, a governmental agency of the state; and any property duly acquired by said agency is state property. This being so, the property of the council may not be used as collateral for a loan, since such an encumbrance of state property would violate Section 6 of Article 9 of the Florida Constitution.

The council is not expressly authorized by statute to borrow money; and, since the powers of administrative boards are limited to those expressly conferred on them or necessarily implied from the powers granted, the council does not have legal authority to borrow money, even if repayment should be made solely from the council's income from the vending stands, and even if the council's (or state's) property were not used as collateral for the loan. This view is supported by the following provision of section 409.26 which provides that the council may:

"(10) Receive moneys or properties by gift or bequest from any person . . . for any of the purposes herein set out, but without authority to bind the State of Florida to any expenditure or policy except such as may be specifically authorized by law; . . ."  
The first question is, therefore, answered in the negative.

(2) Answering the second question, I believe the blind operators of vending stands are not within the purview of the Retirement System Act.

Section 121.02 of the act provides that

"(1) 'State Officers and Employees' shall include all full time officers or employees, except day laborers, who receive compensation for services rendered from State Funds or . . . who re-

ceive compensation for employment or service from any agency, branch, department, institution, or board of the State of Florida . . . provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salaries by the employing state agency . . ."

Under the terms of the contract, the operator is entitled to all the net profits from the stand over and above the monthly percentage of gross sales due the council as an "agency administrative fee." The amount paid as compensation to the operator is not susceptible of being "specified in terms of fixed monthly salaries," but necessarily varies from month to month, as the net profits from the stand vary.

The second question is, therefore, answered in the negative.

(3) The council is not authorized to operate vending machines in public buildings, unless such machines are installed in connection with a vending stand operated by a blind person.

The council is not authorized to engage in the business of operating vending machines, as a separate activity apart from the operation of vending stands. It is authorized to carry on activities to promote the employment of needy blind persons. However laudible the purpose of the council in desiring to operate such machines, such an activity is too remote from authorized activities to be justified under the law.

The third question, therefore, is answered in the negative.

February 18, 1948.—048-63.

#### COUNCIL FOR THE BLIND—HOLDING REAL ESTATE—POWERS OF COUNCIL

QUESTION: May the Florida Council for the Blind lawfully take title to real estate in its name, the real estate to be used to carry out its statutory purposes and duties?

*To Florida Council for the Blind, Mr. W. J. Gardiner, 210 South Beach Street, Daytona Beach, Florida:*

In request for opinion it is explained that the Council for the Blind has made application for the conveyance to the council of certain real property held by the War Assets Administration, to be used by the council for health and educational purposes, and to be acquired under an agreement for 100% discount.

The functions, purposes and duties of the Florida Council for the Blind are set up in section 409.26, Florida Statutes, 1941, as amended. The council is primarily charged with the duty of aiding the blind to find employment, teaching them trades and occupations and, in general, assisting them toward making themselves self-supporting. The council is specifically authorized to establish training schools and workshops for the blind either under its own exclusive control or in cooperation with private workshops, to aid in the development of the social life of the blind through community and recreational facilities and all activities which might ameliorate the condition of the blind. In doing these things the council is authorized to cooperate with other agencies, public and private, and to enter into contracts with public and private agencies, etc. In addition to the foregoing and other functions and duties enumerated in the statute, the council is specifically authorized in section 409.26 (10) to:

"Receive moneys or properties by gift or bequest from any person, firm, corporation or organization for any of the purposes herein set out, but without authority to bind the State of Florida to any expenditure or policy except such as may be specifically authorized by law."

It is my opinion that the statute is sufficient authority for the acquisition of suitable land and buildings by the Florida Council for the Blind to be used for any of the purposes for which the council was established, and for taking the title in the name of the council; provided that in acquiring the property the state is in no manner obligated to any expenditure or to any policy which is not authorized by law. Included in lawful purposes of the council would be the education and the improvement of the health of the blind.

This opinion is not to be construed as either approving or disapproving the acquisition of any particular property.

March 9, 1948.—048-83.

#### COUNCIL FOR BLIND—DEEDS—WAR ASSETS ADMINISTRATION

QUESTION: Would the agreement by the Florida Council for the Blind to the proposed restrictions mentioned below in any manner obligate the state to an expenditure or to any policy which is not authorized by law?

*To Florida Council for the Blind, Mr. W. J. Gardiner, 210 South Beach Street, Daytona Beach, Florida:*

Reference is made to my opinion of February 18, 1948, No. 048-63.

I have examined the six proposed restrictions which are to be placed in a deed from the War Assets Administration to the Florida Council for the Blind. It is my opinion that the agreement by said board to the proposed restrictions would not in any manner obligate the state to any expenditure or to any policy which is not authorized by law.

September 20, 1948.—048-307.

#### COUNCIL FOR THE BLIND—VENDING STANDS REVENUE— CONTRIBUTIONS FROM INDIVIDUALS

QUESTION: Should the following moneys be considered as state revenue under the Five Fund Act and subject to deposit in the state treasury: (a) money derived from an administrative charge against vending stands, and (b) gifts or contributions to the council by individuals, civic clubs or other groups for new vending stands?

*To Honorable M. Robert Barnett, Executive Director, Florida Council for the Blind, Tampa, Florida:*

The request for opinion explains that a small administrative charge is collected from each vending stand in the state based on actual gross sales, and intended for use in setting up new and additional vending stands at other locations; all profits above that small charge are paid back to the operator of the stand as his commissions.

It is my opinion that the money derived from the administrative charge is state revenue within the meaning of the Five Fund Act and must be deposited in the state treasury.

Section 409.26 (10) provides that moneys received by the council by gift for any of the purposes of the act may be disbursed or expended by the council on its own warrant for any of the purposes set out in the statute. It is my opinion that such gifts, donations and contributions are not such revenue as is required by the Five Fund Act to be deposited in the state treasury.



August 25, 1947.—047-297.

#### BLIND CHILD—RESIDENCE REQUIRED—AMENDMENT

QUESTION: Did chapter 23895, Laws of Florida, 1947, repeal the proviso added to section 409.17 (1) by chapter 21879, Laws of Florida, 1943, which authorized aid to certain blind children?

*To Mr. David J. Lewis, Attorney, State Welfare Board, Jacksonville, Florida:*

The original act, chapter 20714, Laws of Florida, 1941, was incorporated in the statutes of 1941 as section 409.17. It provided aid of monthly assistance of not more than \$40.00 to any blind person who, among other qualifications, has resided in the state during at least five years of the nine years immediately preceding the application for assistance and who has resided in the state for the year immediately preceding the application.

In 1943, chapter 21879 extended the assistance to certain blind children by adding the following proviso:

"... provided, however, that such assistance may be paid to any blind child who has either resided in the State of Florida for one year preceding the application for such aid; or was born within the State of Florida within one year immediately preceding the application, if the mother of such person resided in this state for one year immediately preceding the birth of such person."

Chapter 23895, Laws of Florida, 1947, in increasing the monthly assistance from \$40.00 to \$50.00 appears to have followed the original act of 1941 as to those entitled to receive the aid, and omitted the proviso quoted herein, in addition to the increase in the allowance and effect of chapter 23895 was to repeal the proviso added in 1943.

#### DEPENDENT AND DELINQUENT CHILDREN

October 21, 1948.—048-327.

#### JURISDICTION—JUVENILE COURT—AGE OF CHILDREN

QUESTION: Does the Orange County Juvenile Court have jurisdiction to determine, adjudicate and dispose of all cases of children to their 17th birthday or to their 18th birthday?

*To Honorable Mattie H. Farmer, Judge, Orange County Juvenile Court, Orlando, Florida:*

Section 4 of chapter 19113, Laws of Florida, 1939, which was an act creating and establishing the juvenile court of Orange county, says:

"The juvenile Court for Orange County, Florida, shall have original jurisdiction in proceedings relating to, or concerning, any child residing within Orange County, Florida, who has not attained the age of seventeen (17) years, and who is either (1) dependent, or (2) delinquent. That the jurisdiction of said court shall extend to, and consist of, the right to hear, determine, adjudicate and dispose of all cases relating to 'dependent' or 'delinquent' children as now defined by law or as may hereafter be defined by law, and to provide for the protection, custody, maintenance, support, and upbringing of such children."

It will be noted that this section is divisible into two parts—the first sentence fixing the present jurisdiction of the court, and the second sentence being intended to extend that jurisdiction and make it uniform with any subsequent changes in the general law relating to dependent and delinquent children.

It will be further noted that this section says that the jurisdiction of the court extends to any proceedings relating to, or concerning, dependent or delinquent children residing in Orange county who "has not attained the age of 17 years," and to all cases relating to such children then, or thereafter, defined by law.

When this chapter 19113 was enacted there was in force and effect chapter 6216, Florida Statutes, 1911 (section 415.01, Florida Statutes, 1941), which chapter, defining and regulating the treatment and control of dependent and delinquent children, etc., referred to such children as those being less than 17 years of age.

In 1943 this section was amended so that the said section, as amended, raised the age of such children to which it refers to those less than 18 years of age.

Inasmuch as section 4 of said chapter 19113, in determining the jurisdiction of the court said that it should extend to and consist of, the right to hear, determine, adjudicate and dispose of all cases relating to dependent or delinquent children as now defined by law or as may hereafter be defined by law, it is my opinion that said chapter should now be read in connection with section 415.01, as amended by the said laws of 1943, so that the jurisdiction of the said Juvenile Court of Orange County, Florida, now applies to all proceedings relating to and concerning children residing within Orange County less than 18 years of age.

September 3, 1947.—047-291.

#### JUVENILE—JURISDICTION OF COURT—DISPOSITION OF CHILD

**QUESTION:** A committing magistrate in Orange county, upon a preliminary examination, finds there is probable cause to believe a person under eighteen years of age is guilty of having committed a criminal offense. To which court shall the committing magistrate bind the said juvenile?

*To Honorable Jim Black, Sheriff, Orange County, Orlando, Florida:*

Section 4 of chapter 19113, Laws of Florida, 1939, reads as follows:

"The juvenile court for Orange county, Florida, shall have original jurisdiction in proceedings relating to, or concerning any child residing within Orange county, Florida, who has not attained the age seventeen (17) years, and who is either (1) dependent, or (2) delinquent. That the jurisdiction of said court shall extend to, and consist of, the right to hear, determine, adjudicate and dispose of all cases relating to 'dependent' or 'delinquent' children as now defined by law or as may hereafter be defined by law, and to provide for the protection, custody, maintenance, support, and upbringing of such children."

Section 415.21, Florida Statutes, 1941, as amended, reads as follows:

"(1) When any child less than eighteen years of age shall be arrested, with or without warrant, and brought before any court, the judge presiding over such court, either before trial or after trial and conviction, but before sentence, may, in his discretion, take charge of the custody of such child in the same manner as provided by law for the county judge or judge of the juvenile court to take charge of delinquent children, or he may make and enter an order remanding the custody of such child to the probation officer to be dealt with as dependent children are herein provided to be dealt with; or he may sentence him to a Florida industrial school or to such other punishment provided by law for the same offense. If to a Florida industrial school, the sentence shall be conditioned that if such person is not received

or kept there for the term of his sentence, unless sooner discharged by the board of commissioners of state institutions, or if such person is found to be incorrigible or incapable of reformation, he shall then suffer such alternative punishment as the court may designate in such sentence."

Construing these two laws in *pari materia*, it is my opinion that the committing magistrate may bind the said juvenile over to the criminal court having jurisdiction of the crime or to the juvenile court of Orange county, if said juvenile is less than 17 years of age. After the said juvenile is so bound over the judge of the court to which he is bound can then determine what further disposition should be made of the juvenile.

May 19, 1947.—047-137.

#### ILLEGITIMATE CHILD—RELEASE BY MOTHER

QUESTION: Can an unmarried mother who is a minor, legally release her child to a licensed child-placing agency without notifying the parents of the unmarried mother or any guardian of the unmarried mother, and thereafter have a permanent commitment of such child to the licensed child-placing agency by the juvenile court under such consent, without notice in the commitment proceedings to the parents or guardian of the minor unmarried mother?

*To Mr. David J. Lewis, Attorney, State Welfare Board, Jacksonville, Florida:*

In the case of *In re Brock*, 25 So. (2d) 659, the Florida Supreme Court held that an unmarried mother who was a minor could legally consent to the adoption of her child, without notice to anyone. Consent to adoption and consent to permanent commitment to a licensed child-placing agency are substantially the same thing; in both cases the parent surrenders all rights to the child: See section 415.19, Florida Statutes, 1941, as amended in 1943.

It is my opinion that when consent is obtained in the manner set out in section 415.19, as amended, sub-paragraph (12), and the juvenile court enters the order of commitment to the licensed child-placing agency, neither the parents nor any guardian of the unmarried mother need be notified.

May 9, 1947.—047-134.

#### DAY NURSERIES—EXTENT OF REGULATIONS

QUESTIONS: 1. Is the operator of a boarding home, nursery, institution or similar enterprise for the care of children, away from their own parents or guardians, subject to license required by chapter 21013, Laws of Florida, 1941, when the child is under care, for less than twenty-four hours in a day? In other words, does the chapter require the licensing of day nurseries?

2. What is the meaning of the phrase "regulation by any governmental agency" in section 4 of chapter 21013? Does it mean that nurseries or kindergartens are subject to State Welfare Board licensing unless they are actually accredited or licensed by the Department of Education? Would such regulatory powers extend beyond attendance and statistical reports?

3. Does chapter 21013 apply to institutions which do not operate for profit?

4. Is a day nursery operated by a nonprofit association subject to license under section 409.05 of the statutes?

5. Does section 409.05 require licensing of foster homes in which children are placed by their parents and for whom the parents pay board?

*To Mr. David J. Lewis, Attorney, State Welfare Board, Jacksonville, Florida:*

Chapter 21013, Laws of Florida, 1941, requires the State Welfare Board to establish in counties of over 267,000 population, minimum standards for the care of children under seventeen years of age who are being "cared for away from their own parent or guardian by any person, firm, organization, corporation, association, or society operating or conducting a home, nursery institution, or similar enterprise for the care of children." It also provides:

"No person other than a relative or a person who is considering the adoption of a child in the manner provided for by law, and no institution, firm, organization, corporation, association or society may receive any child under seventeen (17) years of age for boarding or custody away from the parent or guardian of such child, and no person, firm, organization, corporation, association or society shall operate any boarding home, nursery, institution, or similar enterprise for the care of children away from their own parents or guardian, unless such a person, firm, organization, corporation, association or society shall have first procured a license from the state board empowering or authorizing such person, firm, organization, corporation, association or society to care for, receive or board a child or children."

It will be observed that the act covers nurseries or any other institution which cares for children away from the parent or guardian. The purpose of the act was for the protection of children when away from parental care, and was, no doubt, built upon the knowledge that children of tender age require constant care to guard against bad sanitation and hygiene, sickness, disease, improper food and immoral influences. Day nurseries usually care for children while the mother is at work. Ordinarily the child is left at the nursery in the early morning and taken home late in the afternoon, thus leaving the child in the nursery for a very substantial (and the most important) part of the day.

The institution is a nursery, whether it cares for children for twenty-four hours per day or only a part of the day. I find nothing in the act which requires exclusion of day nurseries or which restricts the act to those institutions which care for children twenty-four hours per day. It is my opinion that the act covers day nurseries.

The phrase "regulation by governmental agency" in section 4 of the act excludes from the requirements of the State Welfare Board licensing institutions which are under the supervision or regulation or licensing of any other governmental agency which has the duty of protecting the children in matters of health, sanitation, hygiene, immoral influences, etc. For example, institutions within the public school system are not covered by the act because the school system has ample authority to provide the necessary protection for school children.

Answering the last part of the second question, in my opinion, the governmental agency mentioned in the act would not include an agency which has no duties beyond matters of attendance or statistical reports, if there are any such governmental agencies. The act does not cover schools as distinguished from child-caring institutions. No general rule can be stated as to when an institution might be primarily a child-caring agency or a school; each case will depend upon its own facts and circumstances.

In the third question inquiry is made as to whether the act covers institutions which do not operate for profit. The chapter makes no distinction between institutions for profit and institutions which are not for profit. There is no reason for any such distinction. The state is concerned about the welfare of the child, whether the institution is operated



for profit or otherwise. The license issued by the State Welfare Board under the provisions of this act is not to be confused with an ordinary occupational license.

In the fourth question reference is made to section 409.05 of the statutes. That section was to some extent the model for a part of chapter 21013 but there are important differences. Section 409.05 authorizes the State Welfare Board to set up minimum standards for the care of dependent children. Chapter 21013 is not restricted to dependent children. Dependent children within the meaning of section 409.05 would probably not extend beyond the type of children mentioned in section 409.03 and perhaps section 415.01. If the day nursery should be operated for the care of dependent children away from their own homes, it would make the institution subject to license under section 409.05. If the day nursery were operated for children who were not dependent children the institution would not be subject to license under section 409.05 but would be subject to license under chapter 21013 in counties of more than 267,000 population.

In the fifth question reference is made to "foster homes." That term is of recent origin and is not a very good one. It has not been legally defined nor is its meaning clear. While this is no place for a discourse in philology, "foster" ordinarily means something more than nursery or boarding-home care; it includes something in the nature of the personal love and affection of a parent toward a child and the child toward the parent, such as in cases of adoption. I presume, however, that the point in question concerns private homes in which children are accepted for care only, that is, boarding homes or nurseries. Such homes would be subject to license under section 409.05 if, as pointed out, the children are dependent children, otherwise not. The fact that their board may be paid by the parents would not require a different conclusion if they were dependent children, as they could be, within the meaning of section 409.05. This is not to be construed as holding that section 409.05 applies to a case where a parent of one or two children might place them in a private family for foster care, even though the children might be "dependent" children. The statute, in my opinion, would be limited to homes which accept children generally, either as a charitable act or for compensation. The facts and circumstances in each case should be considered.

October 21, 1948.—048-327.

#### JURISDICTION—JUVENILE COURT—AGE OF CHILDREN

QUESTION: Does the Orange County Juvenile Court have jurisdiction to determine, adjudicate and dispose of all cases of children to their 17th birthday or to their 18th birthday?

*To Honorable Mattie H. Farmer, Judge, Orange County Juvenile Court, Orlando, Florida:*

Section 4 of chapter 19113, Laws of Florida, 1939, which was an act creating and establishing the juvenile court of Orange county, says:

"The Juvenile Court for Orange County, Florida, shall have original jurisdiction in proceedings relating to, or concerning, any child residing within Orange County, Florida, who has not attained the age of seventeen (17) years, and who is either (1) dependent, or (2) delinquent. That the jurisdiction of said court shall extend to, and consist of, the right to hear, determine, adjudicate and dispose of all cases relating to 'dependent' or 'delinquent' children as now defined by law or as may hereafter be defined by law, and to provide for the protection, custody, maintenance, support, and upbringing of such children."

It will be noted that this section is divisible into two parts—the first sentence fixing the present jurisdiction of the court, and the second sen-

tence being intended to extend that jurisdiction and make it uniform with any subsequent changes in the general law relating to dependent and delinquent children.

It will be further noted that this section says that the jurisdiction of the court extends to any proceeding relating to, or concerning, dependent or delinquent children residing in Orange county who "has not attained the age of 17 years," and to all cases relating to such children then, or thereafter, defined by law.

When this chapter 19113 was enacted there was in force and effect chapter 6216, Florida Statutes, 1911 (section 415.01, Florida Statutes, 1941), which chapter, defining and regulating the treatment and control of dependent and delinquent children, etc., referred to such children as those being less than 17 years of age.

In 1943 this section was amended so that the said section, as amended, raised the age of such children to which it refers to those less than 18 years of age.

Inasmuch as section 4 of said chapter 19113, in determining the jurisdiction of the court said that it should extend to and consist of, the right to hear, determine, adjudicate and dispose of all cases relating to dependent or delinquent children as now defined by law or as may hereafter be defined by law, it is my opinion that said chapter should now be read in connection with section 415.01, as amended by the said laws of 1943, so that the jurisdiction of the said Juvenile Court of Orange County, Florida, now applies to all proceedings relating to and concerning children residing within Orange County less than 18 years of age.

## FLORIDA STATE IMPROVEMENT COMMISSION

September 18, 1948.—048-308.

### AIRPORTS—ACQUISITION—OPERATION—POWERS OF COMMISSION

QUESTIONS: 1. Does the Florida State Improvement Commission have the power and authority to acquire and hold airports within this state?

2. Does the Florida State Improvement Commission have the power and authority to operate airports within this state?

*To Florida State Improvement Commission:*

The purpose of the statutes creating and relating to the Florida State Improvement Commission and its powers and authority was "to create a state agency primarily to make possible and facilitate the acquisition, construction, maintenance and operation of public buildings, facilities and works where such buildings, works, or facilities are for a state purpose . . . and to promote the general welfare" of the state. (Section 420.02, Florida Statutes, 1941, as amended). The said commission is given power and authority "to own and to acquire by donation, purchase or otherwise . . . real or personal property, . . . and to lease, sell, alienate and dispose of the same or any part or parts thereof, in carrying out the objects and purposes" granted it by law (see sub-section (3), section 420.06, Florida Statutes, 1941, as amended).

Under section 218.07, Cumulative Supplement of Florida Statutes, 1941, "The State of Florida and every board, commission, department, or other state agency, and every officer of the State of Florida authorized by law to make purchases of material, supplies and equipment or other property, real or personal, for state use or purposes" is authorized to purchase surplus properties from the federal government. This grant of power is very broad.

Under section 331.11, Florida Statutes, 1941, the commission may own, construct, maintain and operate administrative buildings non-competitively at county and municipal airports, with the consent of such owners. The commission also has power to "regulate airport hazards at state-owned airports" (section 330.35, Florida Statutes, 1941).

The Supreme Court of Florida, in suits involving the powers and authority of the said Improvement Commission, has been very liberal in construing the statutes relating to the said commission. The statutes have been given a very broad construction. When the said statutory provisions relating to the said Improvement Commission are considered in their entirety, as construed by the supreme court, they seem broad enough to authorize the said Improvement Commission to own airports in this state; however, such airports may not be operated by the said Improvement Commission, but may be operated by others under lease or other arrangement with the said Improvement Commission.

Under the said statutes, in the light of the very liberal construction placed thereon by the supreme court, I am of the opinion that the first question should be answered in the affirmative.

I am of the further opinion that, notwithstanding the liberal construction placed on the statutes by the supreme court, the second question should be answered in the negative.

May 8, 1947.—047-125.

#### IMPROVEMENT COMMISSION—UNEXPENDED FUNDS

QUESTION: May the Florida State Improvement Commission carry forward an unexpended balance of its \$50,000 annual continuing appropriation at the end of the fiscal year 1945-46 for use in the fiscal year 1946-47?

*To Honorable C. M. Gay, State Comptroller:*

That part of section 420.11, Cumulative Supplement, Florida Statutes, 1941 (section 6 of chapter 22821, Laws of Florida, 1945), pertinent to the question reads as follows:

"For the administration of this chapter, there is hereby appropriated from any moneys in the general revenue fund of the State of Florida not otherwise appropriated, the sum of fifty thousand dollars annually; . . ."

I gave an affirmative answer to a similar question with reference to an appropriation in substantially the same language and for like purposes in an opinion of July 1, 1946, No. 046-269, addressed to Honorable Terry C. Lee, budget director. I find nothing in section 420.11 or elsewhere which would require a different ruling in this case.

The question is answered in the affirmative for the reasons set out in the opinion mentioned, copy of which is enclosed herewith.

#### RURAL ELECTRIC COOPERATIVE LAW

September 22, 1948.—048-312.

##### OCCUPATIONAL LICENSE TAXES

QUESTION: Are the Rural Electric Cooperatives operating in this state, under and by virtue of chapter 425, Florida Statutes, 1941, subject to occupational license taxes under the laws of this state?

*To Honorable C. M. Gay, State Comptroller:*

Such cooperatives appear to be organized and incorporated under state law (chapter 425, Florida Statutes, 1941), although they are author-

ized to receive loans, to enable them to carry out their objects and purposes, from the Rural Electrification Administration, an agency of the United States (section 901-914, title 7, United States Code).

I find nothing in either the state or federal statutes aforementioned, which grants to such cooperatives exemption from taxation in this state, as did the statute involved in the case of *McCarroll v. Ozark Rural Electric Cooperative Corporation*, 201 Ark. 329, 146 S. W. 2d. 693. I find nothing in the occupational license tax laws of this state granting exemption from such taxes to rural electric cooperatives. They are corporations under the laws of this state and are agencies of neither this state nor of the federal government.

It, therefore, seems that the question should be answered in the affirmative.



## CHAPTER XXV

### LABOR

#### UNEMPLOYMENT COMPENSATION LAW

January 24, 1948.—048-27.

##### INTERSTATE BENEFITS—AUTHORITY TO PARTICIPATE

**QUESTION:** May the Florida Industrial Commission lawfully enter into an interstate benefit payment plan, such as is outlined below.

*To Honorable Carl B. Smith, Chairman, Florida Industrial Commission:*

It appears that the Florida Industrial Commission has been presented for its consideration a new interstate benefit payment plan enlarging upon the plan now and hitherto in force concerning interstate claimants of benefits under the unemployment compensation law.

This new plan, briefly, contemplates the following: Under such plan the eligibility of such a claimant will be determined by the state in which potential rights to such benefits accrue, which will include a determination of the amount and duration of benefits, disqualifications, and eligibility with regard to separation from the applicant's last employment. All other eligibility issues will be determined by the state where the claim for benefits is filed, it being specifically pointed out that as to certain of such issues the disqualification provisions found in section 443.06, Florida Statutes, 1941, as amended, are more severe in relation to the applicant than similar provisions found in certain of the other states. Thus, except as to those matters covered by the initial determination in connection with such an interstate claim, the claimant's right to benefits will be determined by the state where the claim is filed under its laws and in like manner as it deals with its own intra-state claimants, and such state will obtain necessary information and decide any issue involved in the re-opening of the claim—that is to say, a continuation of a weekly claim subsequent to the initial determination of the first claim. The amount of benefits payable by the state where the claim is filed shall be in accord with the law of the state making the initial determination, and the latter state will reimburse the former state for all such benefits so paid. May the Florida Industrial Commission lawfully enter into such interstate benefit payment plan?

If the commission has the authority to enter into such a plan, that authority must derive from the provisions of that part of section 443.18, Florida Statutes, 1941, as amended, as follows:

"Potential rights to benefits accumulated under the unemployment compensation laws of one or more States or under one or more such laws of the Federal Government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms which the Commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund."

The proposed plan presents two disturbing questions:

The first of these derives from the fact that under the plan, after the initial determination of eligibility for benefits, the laws of the state where the claim is filed, as distinguished from the Florida laws, will determine the continued right to benefits even though the laws of such state covering eligibility for benefits after such initial determination may be at distinct variance with, and more lenient to the claimant, than provisions of section 443.06, Florida Statutes, 1941, as amended related to such issues.

The second of these questions arises from the fact that since, pursuant to section 443.08 (3), Florida Statutes, 1941, as amended, all benefits paid to Florida claimants are chargeable to the accounts of their former employers for the purpose of determining such employer's rates of contribution, under the foregoing plan the rate of a Florida employer, fixed as provided in said section 443.08 (3), as to interstate claimants could be adversely affected as a result of the provisions of the laws of other states which are at variance with the provisions of Florida laws upon the same subject.

In view of the foregoing, in my opinion the question is properly answered as follows:

It would not seem necessary to point out the obvious constitutional implications presented by the questions concerning such plan mentioned above. It may be that if the plan were submitted to the courts in appropriate proceedings, the courts would adjudicate that the Florida Industrial Commission has the authority under such quoted provision of law to enter into such plan. However, such reasonable and respectable doubt exists with respect to the right of the commission to enter into such plan because of the apparent obstacles mentioned, in my opinion, reasonable prudence and caution dictates that the commission should not enter into the plan, at least until the commission is authorized to enter into such plan in pursuance of appropriate proceedings by the court, or unless and until, specifically, the Legislature should authorize the commission to make the arrangements in connection with inter-state claims contemplated by this plan. Even if the Legislature should at some time in the future by specific legislation authorize the commission to enter into the arrangement contemplated by the plan, I cannot say at this time that such a law would be constitutional, and venture no opinion with respect to the same.

### WORKMEN'S COMPENSATION LAW

July 23, 1948.—048-244.

#### NATIONAL GUARD PERSONNEL—STATE SERVICE— COMPENSATION FOR INJURY

QUESTION: Are the "part-time" members of the Florida National Guard entitled to compensation, medical and other benefits as employees of the guard, under the workmen's compensation act (440.41, Florida Statutes, 1941), if injured by accident arising out of and in the course of their activities with the guard?

*To Florida Industrial Commission:*

This opinion is limited to personnel of the National Guard while in the service of the State of Florida as distinguished from federal service.

The Supreme Court of the State of Florida has never determined this question but several of the courts of last resort of other states have done so. There seems to be a division of authority. (See annotations 150 A. L. R., page 1456.)

The better and more humane rule to me seems to be that personnel of the National Guard while in service of the state are employees of the State of Florida within the meaning of section 440.02 (1) and (2), Florida Statutes, 1941.

I, therefore, answer the question in the affirmative.

February 4, 1947.—047-29.

#### DEATH BENEFIT CLAIM—DETERMINATION

QUESTION: Where, under the conditions hereinafter specified, the State Beverage Department submits to the comptroller a voucher payable

to the widow of a deceased employee of said department for expenses of the last illness and burial of said employee, is there any authority of law for the payment of such voucher by the State of Florida?

*To Honorable C. M. Gay, State Comptroller:*

The voucher is dated January 24, 1947, aggregates \$504.84 for the expenses referred to in the question, and has been approved for payment by the director of the State Beverage Department. It appears that said voucher was forwarded on January 24, 1947, with a letter from said department acknowledging that it has not been medically established, and definite proof seems to be lacking, that the death of said employee arose out of, and in the course of, his employment as a supervisor of said department, but at the same time stating the belief that death did so arise, and asserting that the state has a moral obligation to pay the voucher.

The only law under which compensation can be paid by the State of Florida in connection with the death of this employee is the Workmen's Compensation Law which is administered by the Florida Industrial Commission pursuant to chapter 440, Florida Statutes, 1941, as amended. In order that a determination can be made as to whether such compensation is payable, a claim will have to be filed, prosecuted and passed upon as provided by the terms of that chapter. On the very face of the letter from the State Beverage Department, the facts relating to the cause of death are uncertain and controversial and any decision in this particular must be made by said commission or upon subsequent appeal to the state courts under the applicable provisions of chapter 440. This proceeding, of course, would be against the State Beverage Department, a department of the government of the State of Florida. In these circumstances, this office is in no position to pass upon the propriety of the claim or even to conjecture as to the ultimate outcome of the filing of such a claim.

Insofar as the particular voucher in question is concerned, it is my advice that there is no authority of law authorizing the payment of the same by the State of Florida.

October 3, 1947.—047-321.

#### DELINQUENT CONTRIBUTIONS—SETTLEMENT OF UNPAID ACCOUNTS

**QUESTION:** Does the Florida Industrial Commission have the authority to settle claims for delinquent unemployment compensation contributions, and cancel liens existing in connection therewith, on a compromise basis, i. e., for payment of less than the full amount due thereon, including interest, when

(a) The employer has failed and refused to pay such contributions in full upon demand thereof by the commission, and

(b) Such claim has been classified as uncollectible because of the return of the unemployment compensation tax warrant, "Nulla Bona," by the sheriff of the county wherein the delinquent employer resides or has his place of business, and

(c) The commission is unable to locate any assets against which levy may be made for the collection of such contributions, and

(d) Such contributions have remained continuously delinquent, due, and unpaid for a period of more than four years, and

(e) The taxes due by such employer with respect to the same wages, pursuant to the provisions of the Federal Unemployment Tax Act, have previously been settled on a compromise basis (payment of less than the full amount due thereon by such employer to the Bureau of Internal Revenue)?

*To Honorable Carl B. Smith, Chairman, Florida Industrial Commission:*

It would not seem necessary to cite authorities in support of the proposition that claims for taxes may be settled for less than amounts due only in pursuance of valid legislative authority. Furthermore, serious doubt exists of the right to release or compromise any indebtedness due the state in the absence of statute authorizing such action.

There appears to be no explicit or implicit authority in chapter 443, Florida Statutes, 1941, for compromise settlement by the commission of delinquent claims for unemployment compensation contributions, or for cancellation of liens therefor, under the conditions and circumstances found in the question. It appears from section 443.15, Florida Statutes, 1941, as amended, that the commission is authorized to satisfy of record, notice of liens for such unpaid contributions, only upon payment of amounts due thereunder or upon determination by the commission that such notice of lien was erroneously issued.

As is apparent from the request for opinion, it is recognized that the authority of the federal government to effect compromise settlement of old tax claims is in pursuance of federal law.

In view of the foregoing, in my opinion the question is properly answered as follows:

In the absence of specific statutory authority grave doubt exists that the commission is authorized to effect compromise settlement of delinquent claims for unemployment contributions or to cancel notices of lien therefor in pursuance of such settlements.

November 22, 1947.—047-397.

#### ELEVATOR CODE—USE OF ELEVATOR FEES

QUESTIONS: 1. What disposition should be made of the fees collected under chapter 24096, Laws of Florida, acts of 1947, and transmitted to the Florida Industrial Commission pursuant to section 9 of said act?

2. Does chapter 24096, Laws of Florida, acts of 1947, providing for the license, inspection, and regulation of elevators, make any appropriation for the enforcement of said chapter?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 24096, Laws of Florida, acts of 1947, regulates the installation, use, repair, alteration, and design of elevators in this state and it is made "the duty of the Florida Industrial Commission to enforce the provisions of this act," (section 10). Under this chapter the commission is authorized to adopt an elevator safety code (section 2), to appoint and fix the salaries of necessary inspectors of elevators in this state, which appointment must be on a merit basis determined by examination for which a ten-dollar fee is charged (section 4), to set up a register of elevators and collect a fee for registration and inspection (section 6), and to otherwise enforce the said chapter. All fees provided for in the act are to be "paid by cash, money order or certified check to the Florida Industrial Commission, who shall transmit same to the commission" (section 9). Said section 9 of the bill as introduced, as well as of the enrolled bill, contains the above quoted language. It would seem an idle gesture for the commission to transmit the fees collected by it to itself; doubtless it was intended that the said fees be transmitted by the commission either to the state comptroller or to the state treasurer. Subsection "C" of section 11 of the act (which may violate section 9, article XVI, of the Florida Constitution) provides that all fines, collected in criminal cases arising under the act, be paid "into the state treasury to the credit of the commission."

Section 215.31, Cumulative Supplement to Florida Statutes, 1941, provides that "revenues, including licenses, fees, imposts or exactions col-



lected or received under the authority of the laws of the State of Florida . . . shall be promptly deposited in the state treasury and immediately credited to the appropriate fund." Section 24, article IV, of the state constitution, provides that "the state treasurer shall receive and keep all funds . . . in such manner as may be prescribed by law." In the light of the foregoing provisions of the statutes and constitution of this state, it seems that the fees collected should be deposited in the state treasury to be credited to the appropriate fund.

Under the statute in question the commission collects certain fees and pays the same over to the state treasury, employs necessary inspectors and fixes their compensation and otherwise enforces the law in question. Unless this statute may be construed as providing funds for its enforcement, it is doubtful that there are any funds from which the expenses of enforcement may be paid. An appropriation need not be made in any particular form of words, nor in express terms; all that is required is a clear expression of the legislative will on the subject (59 C. J. 244, section 388). An appropriation may be implied where the language used reasonably indicates such intention (Riley v. Carter, 165 Okla. 262, 25 P. 2d. 666). The fundamental question is, what did the Legislature intend? (Davis v. People, 78 Colo. 521, 242 P. 995, text 996.) The language of chapter 24096, when read in its entirety seems to be sufficient as an appropriation within prior opinions of this office (see 1945-1946 Biennial Report, pages 363 and 578). I am, therefore, of the opinion that the fees collected and paid into the state treasury by the commission should be credited to a separate fund to be used for the enforcement of said chapter 24096.

September 20, 1948.—048-306.

BOARD OF PUBLIC INSTRUCTION—SELF-INSURER—  
INJURY TO BUS DRIVER

**QUESTION:** Under the circumstances outlined below, is the County Board of Public Instruction liable as a self-insurer for damages to a bus driver?

*To Honorable Colin English, State Superintendent of Public Instruction:*

It appears from information contained in request for opinion that a bus driver for the Board of Public Instruction who is employed in one of the counties on a ten months' basis and receives his pay in ten instalments, but, who also has the duty of taking care of the bus that he operates during the time that the schools are closed, moved his bus from its garage either for repairs, or other purposes, and on returning the bus, he fell from it and injured his shoulder. Medical services amounted to approximately \$20.00 which was all this individual requested.

The County Board of Public Instruction is an employer under the workmen's compensation act. See section 440.02 (4). The board is a self-insurer unless it has elected to procure and maintain insurance as authorized by the statute. See section 440.38 (5). Accordingly, if the county board is liable, it is liable as a self-insurer.

I cannot advise whether or not the board is liable in this instance because of lack of information. Under certain conditions, for example, such as those set up in section 440.09 (3), the board would not be liable; and under certain circumstances set up in section 440.13 (1), the board would not be liable for medical expenses. Whether or not facts and conditions exist which would relieve the county board of liability is a matter to be determined by the county board, and the board has the duty of investigating all pertinent facts to determine whether it is liable under the statute.

## CHAPTER XXVI

### PROFESSIONS AND VOCATIONS

#### BASIC SCIENCE LAW

April 19, 1948.—048-142.

##### MEDICAL PERSONNEL—STATE INSTITUTIONS

**QUESTION:** Is the Board of Commissioners of State Institutions of the State of Florida empowered to employ experienced medical personnel from without the State of Florida to service exclusively in state institutions as staff members without taking the basic science and medical examinations, when such Board of Commissioners is unable to obtain such medical personnel residing in the State of Florida?

*To R. D. Thompson, M.D., Superintendent and Medical Director, State Tuberculosis Sanatorium, Orlando, Florida:*

Chapter 23675, Laws of Florida, 1947, provides:

"Section 1. The Superintendent of the Florida State Hospital and any other institution under the direction of the Board of Commissioners of State Institutions when in need of additional medical personnel and unable to obtain such medical personnel residing in the State of Florida, the Superintendent, with the approval of the Board of Commissioners of State Institutions, may employ competent, experienced medical personnel from without the State of Florida.

"Section 2. That so long as any medical personnel employed under the provisions of Section 1 of this Act is engaged exclusively on the medical staff of such institutions and does not engage in private practice within the State of Florida, such medical personnel shall be exempt from existing requirements of law as to time of residence in the State and also as to requirement as to passing examination in basic science.

"Section 3. It shall be the duty of the Superintendents of State Institutions before employing any medical personnel under the provisions of this Act to make a thorough investigation as to qualifications, experience, character and ability of such medical personnel."

It will be noted that section 2 provides in part that "... such medical personnel shall be exempt from existing requirements of law as to time of residence in the State and also as to requirement as to passing examination in basic science," and further, that such personnel "... is engaged exclusively on the medical staff of such institutions and does not engage in private practice within the State of Florida."

Section 456.03, Florida Statutes, 1941, provides in part:

"No person shall be eligible for examination or permitted to take an examination for a license to practice the healing art or any branch thereof . . . until he has presented to the licensing board or other authority empowered to issue such license, a certificate of proficiency in the basic sciences as provided in this chapter . . ."

It would therefore seem that the intention of the Legislature in enacting chapter 23675, Laws of Florida, 1947, was the exemption of such personnel from the requirements as to examination under the basic science

law or a medical examination to practice the healing arts as a physician. It further appears that the requirements of sections 112.02 and 112.03, relating to employment of residents of the State of Florida, have been suspended in the selection of medical personnel of state institutions under the circumstances prescribed in chapter 23675.

The question is therefore answered in the affirmative.

March 13, 1947.—047-72.

#### CONSULTING PSYCHOLOGIST—LICENSE

QUESTIONS: 1. Are consulting psychologists within the purview of chapter 456, Florida Statutes, 1941, which relates to the practice of the basic sciences in this state, or any other statute regulating and governing professions in this state?

2. Are occupational licenses required of consulting psychologists who practice their profession within this state?

*To Honorable C. M. Gay, State Comptroller:*

Section 456.02, Florida Statutes, 1941, defines the "basic sciences" within the purview of chapter 456, Florida Statutes, 1941, as "anatomy, physiology; chemistry; pathology; bacteriology." Examinations under the said chapter cover the said five basic sciences (section 456.06, Florida Statutes, 1941). As usually understood, the sciences of anatomy, physiology, chemistry, pathology and bacteriology do not include that of psychology (see definitions of said words in Webster's New International Dictionary and in American Illustrated Medical Dictionary). "The phenomena of mental life are usually regarded as outside of the ordinary scope of physiology" (page 1853 Webster's New International Dictionary). Such phenomena are usually embraced within the science of psychology (page 1158 American Illustrated Medical Dictionary).

Section 456.02, also defines "healing arts" as systems, treatments, operations, diagnoses, prescriptions or practices for the ascertainment, cure, relief, palliation, adjustment or correction of human diseases, ailments, deformities, injuries and unhealthy or abnormal physical or mental conditions. Psychology is that science that deals with mental processes, both normal and abnormal, and their behaviors (see work "psychology" in Taber's Cyclopedic Medical Dictionary, in Webster's New International Dictionary and the encyclopedias). These works show that the science of psychology is divided into many branches, including faculty psychology, rational psychology, functional psychology, structural psychology, and many other branches. These works also show that psychology has many fields of operation, including educational, vocational, industrial, clinical, and others. Only a few of these should be considered as in any way coming within the foregoing definition of "healing arts." There are many divisions of the science of psychology that should never be classified as coming within the realm of medicine. Abnormal psychology has been defined as the study of irregular or pathological mental phenomena (see work "psychology" in Taber's Cyclopedic Medical Dictionary); this seems to relate to "unhealthy or abnormal" . . . mental conditions so as to come within the definition of the "healing arts" as defined in section 456.02, Florida Statutes, 1941.

By "abnormal psychology" is meant the study of mental processes that deviate from an imagined norm. When the deviation is unmistakable the term "psychopathology" is more often employed. Otherwise the term "medical psychology" or "clinical psychology" is the usual term. (Volume 1, Encyclopaedia Britannica, page 50).

In the case of *State v. Evertz, Mo.*, 202 S. W. 616, the defendant held himself out as a "suggestionist" and his method of treatment as "auto-suggestion." This was held to be the practice of medicine in that state.

A consulting physician has been held to be one who consults with an attending physician concerning one of his patients (12 C. J. 1308) but does not necessarily diagnose, treat or prescribe for such patient.

As psychology covers fields other than that of medicine, it seems clear that so long as one practices psychology not connected with medical treatment that he should not be deemed to be practicing medicine. If one applies psychological principles to a person for the purpose of treating or correcting an abnormal mental condition then he is practicing medicine although he prescribes no drugs. I see little distinction between treating a mental disease and treating a physical disease, for the purpose of correcting the same. Therefore, I am of the opinion that psychologists who attempt to treat or consult in the treatment of mental diseases should be required to procure a medical license. Psychologists who consult with educational authorities, employers, and the like concerning psychology connected with education, employment, etc., should not be classified as practicing medicine.

It, therefore, seems that the answer to the first question should be a qualified one. If the consulting psychologist consults with regard to the treatment or correction of a mental condition, he is practicing medicine in this state, otherwise he is not. He would only be required to pass a basic science examination, as a condition precedent to practicing in this state, if he practices psychology connected with the treatment of mental or other diseases.

As to the second question, a psychologist setting himself up for the purpose of consulting with the educational authorities, employers, and others, or the medical profession, would be practicing a profession within this state so as to come within chapter 205, Florida Statutes, 1941, and should procure an occupational license thereunder. This is true, irrespective of the first question. In most cases the license would be under section 205.52, Florida Statutes, 1941.

February 9, 1948.—048-44.

#### PRACTITIONER—SCIENCE OF LIFE—PREREQUISITE

QUESTION: Should one who wishes to practice as a Science of Life practitioner in the State of Florida be required to take the basic science examination as provided by chapter 456, Florida Statutes, 1941?

*To Honorable M. W. Emmel, Secretary, Board of Examiners in the Basic Sciences, University of Florida, Gainesville, Florida:*

I have noted the letter of applicant Ebram B. Wright under date of January 30, 1948, in which he describes the practice as

"This science deals with thought force and right thinking, thought controls the internal secretions of the ductless glands of the physical body, and through this science we are able to remedy a good deal of physical disturbances in the body."

It is my opinion that the practice of the Science of Life as outlined in Mr. Wright's letter would be almost identical to the practice of physiological psychology, defined by Webster's International Dictionary, Second Edition, as follows:

"Physiological psychology treats of the bodily functions, as of the sense organs, nervous system, muscles, and glands, in their relation to mental processes."

This practice would also be quite similar to the practice of metaphysical healing. Under date of September 23, 1942, this office rendered an opinion regarding the requirements to practice metaphysical healing. On March 13, 1947, this office rendered an opinion, No. 047-72, regarding the



practice of psychology within the purview of chapter 456, Florida Statutes, 1941. Attention is invited to contents of these opinions.

The two opinions aforementioned should answer the question, namely, one desiring to follow the particular calling designated as Science of Life practitioner, even if not specifically regulated by the laws of the State of Florida, must secure the necessary occupational license for the privilege of practicing such profession; and before being entitled to receive such license he must present to the licensing authorities a certificate of proficiency in the basic sciences from the Board of Examiners in the Basic Sciences.

December 17, 1947.—047-419.

#### COLON—THERAPY—PREREQUISITE FOR PRACTICE

QUESTION: Must a person desiring to practice colon-therapy pass the examination provided by chapter 456, Florida Statutes, 1941, known as the Florida Basic Science Law?

*To Honorable M. W. Emmel, Secretary, Board of Examiners in the Basic Sciences, University of Florida, Gainesville, Florida:*

An extended discussion of the question is not necessary. Suffice to say that one wishing to practice colon-therapy in Florida must pass the examination provided by said chapter 456; therefore, such question is answered in the affirmative.

#### CHIROPRACTIC

June 9, 1948.—048-192.

#### REVOCATION CHIROPRACTOR'S LICENSE—MORAL UNFITNESS—PROCEDURE

QUESTION: When complaint has been made to the Florida State Board of Chiropractic examiners as to the moral unfitness of one holding a chiropractic certificate to practice in the State of Florida, what is the procedure to be followed by the board?

*To Florida State Board of Chiropractic Examiners, Florida Theatre Building, Jacksonville, Florida:*

I call attention to section 460.13, Florida Statutes, 1941, reading in part as follows:

"Charges may be preferred to the board against the holder of certificate to practice chiropractic in said state on any of the following grounds: that fraud or deceit was used in securing such certificate; or that the holder thereof no longer possesses a good moral character; or that he has been convicted of a violation of any law in the state; or that he solicits patients through an agent; or that he is addicted the use of narcotic drugs; or that he is in any way or manner guilty of making false, fraudulent, misleading, extravagant or grossly improbable claims or statements as to the efficacy or value of the science of practice of chiropractic in the cure or treatment of any disease or group of diseases; or that he is in any way guilty of any deception or fraud in the practice of chiropractic, or has violated any of the provisions of this chapter.

"Upon receipt of such charges, the board upon an affirmative vote of two of its members may suspend the certificate of the person against whom such charges have been preferred. Immediately, but not more than ten days after such suspension, the

holder of such certificate so suspended shall be notified thereof in writing, and shall also be furnished with a copy of said charges and notified in writing of the time and place for the hearing of said charges by the board, which notice of the time and place shall not be more than twenty days from the date of said suspension. Further time may be granted by the board for said hearing upon application of the accused. Said notice and copy of said charges may be sent by registered mail, postage prepaid to the last known residence or address of the accused, as shown from the files of the board, which shall be construed as sufficient notice to the accused of the suspension of his certificate, and of the time and place of the hearing by said board of the charges so preferred. The board may hold special meetings for the hearing of said charges.

"At said hearing the accused may cross-examine witnesses against him, and produce witnesses in his behalf and appear personally or by counsel. The board shall keep a record of said hearing, the testimony so taken and its findings on said charges. If the board by a unanimous affirmative vote shall sustain said charges, it may revoke said certificate of the accused, and in which event the board shall thereupon give written notice in the same manner as provided for the giving of said notice of suspensions, to the said holder of said certificate, which has been revoked by said board.

"Whereupon the holder of said certificate which has been revoked shall have the right within sixty days to appeal to any court of law or equity having jurisdiction from the action of said board in revoking said certificate, and the action of the board shall be subject to review and decision of said court, or of an appellate court, if an appeal be taken. In the event the holder of said certificate, which has been so revoked shall not within sixty days appeal from the decision of the board, in the manner aforesaid, then the action of the board in revoking said certificate shall be final.

"The action of the board shall be recorded in the same manner as certificates are recorded, and the name of the person whose certificate is so revoked shall be stricken from the list of certificate holders, and he shall be disqualified from practicing chiropody in the State of Florida."

The foregoing quoted section provides in detail the procedure to be followed by the board.

## CHIROPODY

December 16, 1947.—047-416.

### CHIROPODY SCHOOL DIPLOMA—CONDITIONS FOR PRACTICE

**QUESTION:** Where a person presents to the State Board of Chiropody Examiners a diploma from a chiropody school requiring three years of study for graduation at the time of such presentation, but the course of study at said school required only one or two years at the time such a person received said diploma, is such board authorized to accept the diploma as meeting the requirements of chapter 461, Florida Statutes, 1941?

*To Dr. Otto J. Tonnisen, Secretary-Treasurer, State Board of Chiropody, Podiatry Examiners, Jacksonville, Florida:*

The practice of "chiropody," which word is by statutory definition identical with the word "podiatry," is covered by said chapter 461 and

section 461.02 thereof provides, among other things, that a license to practice shall be granted "only upon compliance with the conditions provided in this chapter." By section 461.03 it is provided further that

"Any person who . . . shall present a diploma from a chiropody or podiatry school which requires for graduation a course of study of at least three years, said school approved by the board of chiropody examiners, . . . shall be entitled to be registered and to . . . a license to practice chiropody."

It seems quite clear that the board is authorized to approve the school; however, the Legislature has confined such approval to schools requiring "for graduation a course of study of at least three years," and the legislative intent is evident that the person presenting the diploma must have graduated from a school requiring at least three years of study at the time such person graduated. In these circumstances, I do not believe that the board has any authority to accept a diploma granted on a course of study requiring one or two years and, therefore, the question is answered properly in the negative.

April 1, 1947.—047-98.

#### FOOT APPLIANCES—APPROVAL BY PHYSICIAN

QUESTIONS: 1. Does the law require that each and every foot appliance or device, excluding the commercial sale of customary foot appliances in retail stores, be specifically approved for each individual case by a physician or surgeon licensed to practice medicine in the State of Florida?

2. If the answer to the first question is in negative, then does not section 461.04 conflict with section 461.01, Florida Statutes, 1941?

*To State Board of Chiropody, St. Petersburg, Florida:*

Chapter 461, Florida Statutes, 1941, is the law regulating the practice of chiropody. The chapter specifically exempts certain persons and the sales of certain appliances from the provisions of the law, and in particular, under the exemption provisions (sections 461.04) are the sales under any circumstances of foot appliances and correctional devices for the foot which are made, designed, fabricated or manufactured within the state when such appliances or devices have been approved by a physician or surgeon licensed in Florida. The exemption is to the appliance or device, the type of which, has been so approved.

Therefore, my answer to the first question is negative provided these two factors are present: (a) that the appliance or device is made, designed, fabricated or manufactured in Florida, and (b) if the appliance or device has been approved by a duly licensed physician or surgeon in the State of Florida.

My answer to the second question is negative as there is no conflict between those two sections. The Legislature may limit the application of the act or exempt certain persons and things from the provisions thereof which they have done in the enactment of chapter 461, *supra*. In other words, the law states what constitutes the practice of chiropody, but says those things enumerated in section 461.04, *supra*, do not constitute engaging in the practice thereof.

January 11, 1947.—047-4.

#### SALARY—AUTHORITY FOR PAYMENT

QUESTION: Is the opinion of November 7, 1945, to the governor on the subject "Chapter 22833, Acts of 1945, 'The Five Fund Act'—deposit of all state agency funds in the state treasury", to be construed as

authority to honor salary requisitions at \$30.00 per day of members of the Board of Chiropractic Examiners for meetings held by the board?

*To Honorable C. M. Gay, State Comptroller:*

In the opinion of November 7th I held that the funds of the Board of Chiropractic Examiners collected from fees might be drawn by the board for its operating expenses. That ruling is not to be extended to requisitions for salaries of the board members. No amount is provided in chapter 461 for salaries of board members and there is no authority in the chapter for payment of any salary. Furthermore, the general rule is that where the law fails to provide for compensation for a public officer, his services are deemed to be gratuitous. (*Rawls v. State*, 122 So. 222.) Accordingly, the question is answered in the negative.

July 26, 1947.—047-214.

#### SALARY—RETROACTIVE EFFECT OF LAW

QUESTION: In the light of chapter 24104, acts of 1947, what is the amount for which the comptroller should issue a warrant in payment of the requisition hereinafter described?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 24104 became a law on June 16, 1947 and by section 2 thereof it is provided that each member of the Board of Chiropractic Examiners "shall receive as compensation an amount not to exceed . . . \$100.00 per year for performance of duties in connection with such membership; except that the secretary-treasurer of said board, in addition to the above sum not to exceed . . . \$100.00 per year, shall receive an annual salary up to but not exceeding . . . \$300.00 per annum, as the Board shall deem necessary." The secretary-treasurer of said board presented to the comptroller a requisition dated June 24, 1947, for salary in the amount of \$300.00 for services rendered during the fiscal year ending June 30, 1947.

Prior to the enactment of chapter 24104 there was no provision of law for the payment of a salary to such secretary-treasurer so that his right to a salary for services rendered before the passage of such act is dependent upon that act. Although retroactive legislation is not in terms forbidden by the state or federal constitutions, a statute will not be given a retroactive effect unless its provisions show clearly that such was the effect intended by the Legislature. There is nothing in the act to suggest, even remotely, that the Legislature intended anything other than that chapter 24104 should have a prospective operation. (See *State ex rel. Bayless v. Lee*, 156 Fla. 494, 23 So. (2d) 575.) Therefore, I am of the opinion that no warrant should be issued on said requisition and that the requisition should be returned with an explanation for such action.

#### NURSING

December 22, 1947.—047-424.

##### ADMINISTERING ANESTHETICS—REQUISITES FOR ADMINISTERING DRUGS

QUESTIONS: 1. Does a nurse have the right to administer or give anesthetics either as (a) an independent enterprise, that is, to set up the general practice of administration of anesthetics, or (b) under the aegis or actual employment of a hospital or physician?

2. If the answer is "No" would a hospital course in a department of anesthesiology in a teaching hospital legally permit a registered nurse to give anesthetics?



3. If the answer is "Yes" may she use any form or type of anesthesia and any drug or medicant in connection with the administration of anesthesia, such as introduction of air ways, intratracheal tubes, intravenous medications, blood transfusions, serums, etc.?

4. If the answer is "Yes" does she need to be licensed by the Florida State Board of Nurses?

*To Dr. Harold D. Van Schaick, Secretary-Manager, State Board of Medical Examiners, LaGorce Island, Miami Beach, Florida:*

1. (a) In *Frank v. South*, Ky. 194 S. W. 375, and *Chalmers-Francis v. Nelson*, Calif. 57 Pac. (2d) 1312, I find that the supreme court of the respective state in each of these cases has rendered an opinion to the effect that a nurse may administer anesthetics when administered under the immediate direction and supervision of the operating surgeon and that to do so would not constitute the practice of medicine by the nurse.

A later case decided in 1947, namely, *State v. Catellier*, Wyo. 179 Pac. (2d) 203, involved the administration of anesthetics intravenously by a chiroprapist, from the effects of which the patient died. It was held in this case that such administration of anesthetics was in a great many instances dangerous to the patient and when administered by the chiroprapist as an independent enterprise it constituted the "practice of medicine" under the Wyoming statute which is quite similar to chapter 458, Florida Statutes, 1941.

It is, therefore, my opinion that the administration of anesthetics by a nurse as an independent enterprise would constitute the practice of medicine under the laws of the State of Florida.

1. (b) The answer given to question 1(a) would appear to answer question 1(b). I am of the opinion that a nurse, whether registered or practical, may administer anesthetics but may do so only under the immediate direction and supervision of a physician. It must be borne in mind, however, as indicated, that in many instances the administration of anesthetics might be highly dangerous to the patient and that under the rule of respondent superior the physician or operating surgeon would be personally responsible for acts of negligence on the part of the nurse who is administering the anesthetic under his direction and supervision.

2. It is my opinion that no amount of hospital training in anesthesiology would cure the legal disability of the nurse, whether trained nurse or practical, to administer anesthetics as an independent enterprise.

3. As long as the nurse administers the anesthetics under the direct supervision, direction and control of a registered and licensed physician, I am of the opinion that the nurse may use any form or type of anesthesia as directed by such operating surgeon.

4. Chapter 464, Florida Statutes, 1941, provides that it shall be unlawful for any person to practice nursing as a trained nurse without having obtained a certificate or license or permit of registration as therein provided for. I am of the opinion that the administration of anesthetics when under the direct supervision, direction and control of a duly licensed physician or surgeon may be done by either a practical nurse or trained nurse in the discretion of the physician or operating surgeon.

June 3, 1947.—047-150.

#### INCREASE IN FEES—ALIEN—EDUCATIONAL DIRECTOR

QUESTIONS: 1. Should the nursing board exact an additional \$5.00 registration fee from those applicants who applied for the nurses' examination to be given on June 18 and 19, which applications were filed prior to May 22, 1947, the effective date of chapter 23742, acts of Florida, 1947,

and which applicants were required to pay a \$10.00 fee as provided in section 464.07, Florida Statutes, 1941?

2. What action should be taken by the board with respect to the application and fees accepted prior to May 22, 1947, from persons who are not citizens of the United States of America?

3. What is the time limit for fulfilling the provisions of the passage of chapter 23742, especially as to the appointment of an educational director?

4. Will the board receive an official notice of the passage of chapter 23742, and how many copies be obtained?

*To Miss Kathryn R. Gutwald, Secretary-Treasurer, Florida State Board of Examiners of Nurses, West Palm Beach, Florida:*

1. In my opinion, the first questions should be answered in the negative.

Chapter 23742, acts of 1947, changes the "registration fee" from \$10.00 to \$15.00. However, this fee is required to be paid at the time of the application for the examination, and the act does not state in express terms that the change in the "registration fee" shall apply to those applications made prior to the passage of the act. Nor can it be inferred, from reading the act as a whole, that it was the legislative intent to make this provision retroactive. Therefore, it is my opinion that those applicants who filed their applications and paid the \$10.00 "registration fee" prior to May 22, 1947, in accordance with the law existing at that time, are entitled to take the examinations on June 18 and 19 without payment of an additional \$5.00.

2. With respect to the provisions of chapter 23742 relative to the licensing of persons who are not citizens of the United States, it may be that there is a constitutional question involved, and, as you may know, it is not the custom of this office to give an opinion as to the constitutionality of a statute.

In my opinion, therefore, the board should comply with the letter of the law (that is, "no certificate or license or registration" should be issued to any persons who are not citizens of the United States of America), until such time as the board is directed to do otherwise by a court of competent jurisdiction.

3. With respect to those provisions of chapter 23742 which confer additional powers and duties on the board, as, for example, the appointment of an educational director, the board, in my opinion, has a reasonable length of time in which to comply with same.

4. I am advised that the board will not receive official notice from the office of the secretary of state of the passage of chapter 23742. I understand, however, that printed copies of the act may be obtained upon request, from that office within a week or two.

October 28, 1947.—047-364.

#### NURSE EXAMINERS—NON-CITIZENS AS NURSES—ISSUANCE OF LICENSES

QUESTION: May the Florida State Board of Examiners of Nurses authorize nurses who are not citizens of the United States of America to practice as licensed attendants or as registered nurses?

*To Miss Kathryn R. Gutwald, Secretary-Treasurer, Florida State Board of Examiners of Nurses, West Palm Beach, Florida:*

The Provisions of section 6 of chapter 23742, Laws of 1947, that "... no certificate or license or registration shall be issued to any person who is not a citizen of the United States of America."

are clear and unequivocal, and absolutely preclude the issuance of a certificate or license to any person who is not a citizen of this country.

In my opinion, therefore, the question must be answered in the negative.

July 13, 1948.—048-233.

#### ADDITIONAL FEES—SUPPLYING COPIES OF RECORDS

**QUESTION:** May the Florida State Board of Examiners of Nurses prescribe fees for supplying registered nurses with duplicate copies of the board's records, as well as a fee for "endorsing" a nurse registered in Florida who wishes to register in another state?

*To Mrs. Delcie C. Inglis, R.N., Secretary-Treasurer, Florida State Board of Examiners of Nurses, 119 Newnan Street, Jacksonville, Florida:*

In my opinion, the question must be answered in the negative.

The statute (chapter 464, Florida Statutes, 1941), expressly prescribes certain fees, and stipulates that

"All of the expenses of the board including salaries shall be paid from moneys received as fees under the provisions of this chapter upon vouchers itemized and certified to the comptroller."

It may fairly be said, therefore, that the statute contemplates that the prescribed fees should cover all the expenses of the board.

While the board is authorized to promulgate "such rules and regulations as may be necessary for its government not in conflict with the laws of this state," the rule is that an administrative board may not issue a regulation which is out of harmony with, or which alters, extends, or limits the statute being administered. (42 Am. Jur., Public Administrative Law, page 358.) A regulation establishing the proposed fees would operate to alter and extend the provisions of the statute prescribing the fees to be charged to pay the costs of administering the statute.

While it may well be that the Legislature has the right to delegate to the board, within constitutional limits, the authority to prescribe such additional fees, it is perfectly clear that no such authority was attempted to be delegated. And, as pointed out heretofore, a reasonable construction of the statute is that the fees prescribed were intended to cover all the expenses of the board. This construction is in line with the general rule that statutes imposing licenses and business taxes are generally to be construed liberally in favor of the citizen and strictly against the government, especially where they provide penalties for their violation. (53 C. J. S., Licenses, page 495.)

While the fees proposed to be established by the board would be required to be transmitted to the state treasurer to be credited to the State Board of Nurses' Fund (section 464.05) and thus would not, technically, amount to direct compensation to the board or its employees, the following well-settled rule, followed in Florida (*Rawls v. State*, ..... Fla., ..... 122 So. 222), would also prohibit the board from requiring the additional fees:

"Public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the rendition of such services is deemed to be gratuitous."

This is not to say that the board cannot, by agreement with a nurse, be reimbursed for money actually expended by the board for photostatic or other copies of records supplied at the request of the nurse. But this

is an entirely different question from that involving the authority of the board to set up an arbitrary schedule of fees for services to be rendered presumably by its own employees in the course of their employment.

June 3, 1947.—047-150.

#### INCREASE IN FEES—ALIEN—EDUCATIONAL DIRECTOR

QUESTIONS: 1. Should the Nursing Board exact an additional \$5.00 registration fee from those applicants who applied for the nurses' examination to be given on June 18 and 19, which applications were filed prior to May 22, 1947, the effective date of chapter 23742, acts of Florida, 1947, and which applicants were required to pay a \$10.00 fee as provided in section 464.07, Florida Statutes, 1941?

2. What action should be taken by the board with respect to the applications and fees accepted prior to May 22, 1947, from persons who are not citizens of the United States of America?

3. What is the time limit for fulfilling the provisions of the passage of chapter 23742, especially as to the appointment of an educational director?

4. Will the board receive an official notice of the passage of chapter 23742, and how may copies be obtained?

*To Miss Kathryn R. Gutwald, Secretary-Treasurer, Florida State Board of Examiners of Nurses, West Palm Beach, Florida:*

(1) In my opinion, the first question should be answered in the negative.

Chapter 23742, acts of 1947, changes the "registration fee" from \$10.00 to \$15.00. However, this fee is required to be paid at the time of the application for the examination, and the act does not state in express terms that the change in the "registration fee" shall apply to those applications made prior to the passage of the act. Nor can it be inferred, from reading the act as a whole, that it was the legislative intent to make this provision retroactive. Therefore, it is my opinion that those applicants who filed their applications and paid the \$10.00 "registration fee" prior to May 22, 1947, in accordance with the law existing at that time, are entitled to take the examinations on June 18 and 19 without payment of an additional \$5.00.

(2) With respect to the provisions of chapter 23742 relative to the licensing of persons who are not citizens of the United States, it may be that there is a constitutional question involved, and, as you may know, it is not the custom of this office to give an opinion as to the constitutionality of a statute.

In my opinion, therefore, the board should comply with the letter of the law (that is, "no certificate or license or registration" should be issued to any persons who are not citizens of the United States of America), until such time as the board is directed to do otherwise by a court of competent jurisdiction.

(3) With respect to those provisions of chapter 23742 which confer additional powers and duties on the board, as, for example, the appointment of an educational director, the board, in my opinion, has a reasonable length of time in which to comply with same.

(4) I am advised that the board will not receive official notice from the office of the secretary of state of the passage of chapter 23742. I understand, however, that printed copies of the act may be obtained, upon request, from that office within a week or two.



## PHARMACISTS

February 18, 1948.—048-64.

## RECIPROCITY—SUSPENSION—REGISTRATION OF PHARMACISTS

QUESTION: Does the Board of Pharmacy of the State of Florida have the power under section 465.02 (1) (2) (3), Florida Statutes, 1941, to suspend reciprocity completely between the State of Florida and other states as to the registration without examination of pharmacists registered in such other state which other state has provisions for the registration of pharmacists from Florida on the same conditions?

*To Honorable R. O. Richards, Secretary, Board of Pharmacy, Fort Myers, Florida:*

It will be noted that the provision of section 465.02 (1), Florida Statutes, 1941, provides in part:

“ . . . providing, however, that it shall be optional with the state board of pharmacy to register without examination any pharmacist who is registered in some other state, whose standard of requirements of examination shall be fully equal to the standards of requirements of education in the State of Florida; provided such other state shall register pharmacists from Florida on the same conditions, and the state board of pharmacy in each instance where such reciprocity exists between Florida and the other states having equal requirements shall, in each case, have the power from an examination of such applicants secondary and professional education, character and morals, to determine from facts and circumstances known to the board, whether or not pharmacists from such states may be registered in Florida without examination and if, from the facts and evidence known to the board, it should appear to a majority of the members thereof that any applicant from any other state, whether such state reciprocates with Florida or not, that such applicant is not a person qualified to be registered as a pharmacist in Florida; then the board shall have the power, upon such determination by a majority of its members, to refuse to permit the registering of any such applicant as a pharmacist in Florida . . . ”

In my opinion the word “optional” as used in this paragraph of the law, when read in connection with the entire chapter 465, leads me to the conclusion that the word “optional” should be used in the sense that the board has the power to determine whether the requirements of the other states measure up to the standards established by the authorities of the State of Florida. To construe the word “optional” as meaning that the board has the power to suspend reciprocity completely between the State of Florida and the other states would, in my opinion, render the said law susceptible of being construed as unconstitutional, in that, it could be said to be an invalid delegation of power. (State v. Fowler, 114 So. 435.)

I do not think it necessary to cite any law to the effect that where a statute would bear two constructions—the one that is constitutional must be adopted.

I therefore answer the question in the negative.

April 15, 1948.—048-130.

## BOARD MEDICAL EXAMINERS—QUALIFICATIONS OF MEMBERS

QUESTION: Does the fact that Dr. J. L. Borland, a member of the State Board of Medical Examiners of Florida, is a member of the faculty of the department of medicine of the graduate school of the University of Florida affect his status as a member of the board?

*To Dr. Harold D. Van Schaick, Secretary, State Board of Medical Examiners, LaGorce Island, Miami Beach, Florida:*

Section 458.01, Florida Statutes, 1941, establishing the board of medical examiners, provides in part, "but none of them shall be connected in any way with any medical college."

Sections 458.08 and 458.09, Florida Statutes, 1941, have to do with the powers of the board in passing upon the good standing and reputability of any medical college and the examination of applicants for licenses to practice medicine.

From the data furnished me, I am of the opinion that the department of medicine of the graduate school of the University of Florida is not such a medical college as would come within the intent of section 458.01 and that Dr. Borland's membership on the faculty would in no way affect his status as a member of the State Board of Medical Examiners. His duties as such faculty member relate only to lectures to licensed physicians and do not involve instruction to medical students who might apply to the board, upon completion of their education, for licenses to practice medicine. It is my opinion that the term "medical college" as used in chapter 458, Florida Statutes, 1941, applies only to a school of learning, teaching medicine in its different branches, at which physicians are educated. The question is therefore answered in the negative.

## PLUMBERS

November 14, 1947.—047-382.

### COUNTY PLUMBING INSPECTOR—COLLECTOR OF PLUMBING LICENSES

QUESTIONS: 1. May the Board of County Commissioners of Orange County, Florida, appoint a plumbing inspector for the mile-wide area adjacent to the City of Orlando, as contemplated by section 469.06, Florida Statutes, 1941, and fix the salary to be paid such inspector for his services?

2. Is it legal for such an inspector to collect fees in connection with inspections made by him?

3. Legally, may an inspector appointed by such board, requiring, in the area over which he has jurisdiction, observance of the rules and regulations governing plumbing of the City of Orlando, as contemplated by said section 469.06, have his salary paid by and be under the guidance of the county health unit of Orange county?

*To Dr. Leland H. Dame, Director, Orange County Health Department, Orlando, Florida:*

Section 469.06, Florida Statutes, 1941, provides in effect that in counties of the state having cities or towns of 7,500 or more population according to the last federal census, the county commissioners of such county shall appoint an inspector of plumbing, with certain named qualifications, to inspect all plumbing and drainage installed in the territory embraced in a radius of one mile beyond said city or town limits, and to do such other work as the county commissioners may require; and that all plumbing and drainage done in such territory shall be in conformity with the rules and regulations governing plumbing in the city or town contiguous thereto.

Chapter 21445, Laws of Florida, special acts of 1941, provides, among other things, that the City of Orlando, Florida, by and through its duly authorized officers or employees is empowered and directed to make periodical inspections of plumbing or drainage facilities installed in the territory in Orange County, Florida, embraced within a radius of one mile beyond the city limits of said city; that such inspection shall be made by the

plumbing inspector of said city, or any duly authorized assistant or by such other officer or employee as shall be designated for the purpose by the city council of said city; that such inspections shall be made in accordance with the rules, regulations and ordinances governing the same or similar inspections in the City of Orlando, insofar as such rules, regulations or ordinances relate to plumbers, plumbing, gas fitters, drainage and sanitation; that the city through its said officers and employees is authorized and empowered to charge and collect for such inspections in said one-mile radius the same inspection fees charged and collected for the same inspection work in said city. The act repealed all laws and parts of laws in conflict therewith.

If said chapter 21445 is valid legislation, then the provisions thereof mentioned, repealed the provisions of section 469.06; and each of the foregoing questions of necessity would be required to be answered in the negative. Not long ago the constitutionality of said chapter 21445 was assailed in the Circuit Court of Orange County in the proceedings of W. A. Peeples, et al., vs. City of Orlando, et al., which suit, on October 16, 1946, was dismissed by the court without prejudice. It is not the province of this office in a matter of this nature to determine whether or not an act is constitutional. However, since doubt exists with respect to the constitutionality of said chapter 21445, and uncertainty exists as to whether it or the provisions of said section 469.06 control plumbing inspections in the mile-wide area outside of and contiguous to the corporate boundaries of the City of Orlando, it is recommended that in order to settle the question thus presented the validity and effectiveness of these respective laws be determined by an appropriately instituted and conducted declaratory judgment proceeding.

In view of the foregoing, I hesitate to answer the questions presented at this time.

## PROFESSIONAL ENGINEERS

December 2, 1947.—047-400.

### USE OF WORD "ENGINEER"—MEANING OF "PROFESSIONAL"

**QUESTION:** Where an individual, corporation, firm or partnership does not engage in the practice of professional engineering, as defined under chapter 471, Florida Statutes Annotated, but used the word "engineer" or "engineering" as part of the title of such individual, corporation, firm, or partnership, does the use of such word in such manner constitute a violation of chapter 471, Florida Statutes Annotated, and more specifically a violation of section 471.03 (1), Florida Statutes Annotated?

*To Honorable E. A. Clayton, Attorney for the State Board of Engineer Examiners, Gainesville, Florida:*

In my opinion, the use of the word "engineer" or "engineering" in such a case would not, per se, constitute a violation of section 471.03, Florida Statutes, 1941.

Section 471.02 (5) defines the term "professional engineering" in great detail. Immediately thereafter, in subsection (6) of section 471.02, it is provided that the terms "professional engineer" and "professional engineering" shall have no reference or application to the term "engineer" as applied to certain persons, naming them. The statute thus clearly contemplates that there shall be other engineers than professional engineers, and to hold that the two words are synonymous would do violence to this section of chapter 471.

This view is in accord with the decisions in other jurisdictions, where it has been held that the word "engineer" is ambiguous in nature and not a legal term (Bell Publishing Co. et al. v. Garrett Engineering Co. (Tex.), 170 S. W. 2d 197), and that in common parlance, practical engineers, as

well as graduate or licensed engineers, are included in the designation of persons as engineers (*Employers' Liability Assurance Corporation et al. v. Accident & Casualty Insurance Co. of Winterthur, Switzerland, (C. C. A. Ohio), 134 Fed. 2d 569*).

Furthermore, the provisions of section 471.03, *supra*, being penal in nature, must be strictly construed; and they must also be construed in the light of the statute as a whole. I cannot hold, therefore, that, as a matter of law, the Legislature intended to prohibit altogether the use of the word "engineer" by other than professional engineers, under the provisions of section 471.03. Of course, under sub-section (2) of section 471.03, if the use of the word "engineer" by any person does, as a matter of fact, "tend to create the impression that he is a professional engineer legally authorized to practice his profession in Florida," then the use of such word would be a violation of the statute; the question being one of fact to be determined according to the facts of each case. But I cannot hold that, as a matter of law, such use is prohibited.

The question, must, therefore, be answered in the negative.

## LAND SURVEYORS

December 4, 1947.—047-414.

### COUNTY SURVEYOR—RIGHT TO OFFICE—LAND SURVEYING

QUESTIONS: 1. Where an individual not registered as a land surveyor under chapter 472, Florida Statutes, 1941, has been elected county surveyor pursuant to the law and has received a commission from the governor to such office, and such individual has never qualified to such office as required by law but assumes the title of county surveyor and carries on surveying work as defined by chapter 472, Florida Statutes Annotated, will quo warranto proceedings lie against him to test his right to hold such office?

2. Where an individual not registered as a land surveyor under chapter 472, Florida Statutes, 1941, has not been elected county surveyor and has not received a commission from the governor to such office but assumes the title of county surveyor and carries on surveying work as defined by chapter 472, Florida Statutes Annotated, will quo warranto proceedings lie against him to test his right to hold such title of county surveyor?

*To Honorable E. A. Clayton, Attorney at Law, Gainesville, Florida:*

1. In my opinion, the first question should be answered in the affirmative.

Although the incumbent may not be an officer *de jure*, he is at least a *de facto* officer (see *State v. Wiseheart, 28 So. 2d 589*); and proceedings in quo warranto will lie to try his right or title to the office. (*State v. Ward, 158 So. 273; City of Sanford v. State, 75 So. 619.*)

2. With respect to the second question, it is doubtful that quo warranto proceedings will lie in the situation outlined therein.

I assume, from the facts stated in the letter, that the persons referred to in the second question have assumed the title of county surveyor without any color of authority from anyone, and that they may therefore be considered mere volunteers. If such is the case, such persons would have no standing as "officers," no title or right could be adjudicated, and it is, therefore, doubtful that they could be proceeded against in quo warranto. (See 44 Am. Jur., Quo Warranto, p. 105.)

Such persons could be proceeded against under the provisions of section 472.13, Florida Statutes, 1941, on the ground that they are practicing land surveying without legal authority.



February 25, 1947.—047-53.

#### CIVIL ENGINEER—LAND SURVEY

**QUESTION:** Does chapter 472 of Florida Statutes prevent a civil engineer from making plats and maps required by section 177.02 of Florida Statutes, 1941?

*To Honorable E. A. Clayton, Attorney for Florida State Board of Engineer Examiners, Gainesville, Florida:*

In answer to the question, I am of the opinion that only such civil engineers registered and then qualified to practice in the State of Florida who shall have applied for registration as land surveyors and shall have satisfied the board of their qualifications as land surveyors, are authorized to make maps and plats required by section 177.02 of Florida Statutes, 1941, unless they are otherwise registered land surveyors as required by chapter 472.

Section 177.02 of Florida Statutes, 1941, provides:

"Whenever any city, town or addition thereto, shall be laid out or altered as hereinafter provided, or whenever any land shall be platted into lots and blocks, within this state, the proprietor or proprietors thereof, shall cause a survey and true map or plat thereof to be made by a civil engineer or competent surveyor." Section 472.08 provides that:

"This chapter shall not apply . . . to those professional engineers registered and then qualified to practice in the State of Florida who shall apply for registration as land surveyor and shall satisfy the board of their qualifications as land surveyors under this chapter . . ."

In the absence of compliance with the foregoing quoted part of section 472.08, I am of the opinion that all the provisions of chapter 472 are applicable to all civil engineers, and within the prohibition of section 472.02, which states:

"No person shall practice land surveying without having first been duly and regularly registered by the board as a land surveyor as required by this chapter . . ."

#### PUBLIC ACCOUNTANTS

September 5, 1947.—047-292.

#### SUSPENSION—REINSTATEMENT—BENEFITS

**QUESTION:** Is a public accountant heretofore suspended for failure to register and pay the annual registration fee, but who now, upon payment of such delinquent fees, has been reinstated by the State Board of Accountancy, entitled to the benefits of section 6, chapter 24164, acts of 1947, upon compliance with the requirements of that section?

*To Honorable Bryan Willis, State Auditor:*

Section 473.12 of the statutes as amended by chapter 24164, Laws of Florida, 1947, requires the suspension of the certificate of a public accountant who fails to annually register and pay the registration fees to the State Board of Accountancy, after notice, etc., but authorizes reinstatement by the board upon subsequent registration and payment of all delinquent registration fees.

Section 6 of chapter 24164, Laws of Florida, 1947, is new. It provides that a person of good moral character holding a certificate of authority in

good standing from the State Board of Accountancy to practice as a public accountant and who has practiced in this state for a period of ten years next preceding the effective date of the act, may be issued a certificate under rules of the board as to qualifications and fitness, to practice as a certified public accountant upon certain conditions and requirements set up in the statute.

It is my opinion that section 473.12, as amended by chapter 24164, in authorizing reinstatement of public accountants gives to such reinstated public accountants all of the privileges of said section 6 of chapter 24164 to the same extent as they may be enjoyed by any other public accountant holding a certificate of the State Board of Accountancy. The question is answered in the affirmative.

July 29, 1947.—047-226.

#### PREREQUISITE EXPERIENCE—TRAINING—EXAMINATION

**QUESTIONS:** 1. Under the provisions of section 473.08, would a qualified accountant of good, moral character, in the employ of the State Auditing Department for a period of three or more years, be eligible to sit for the C. P. A. examination?

2. Under the provisions of section 473.11, would a graduate of either of the two Florida universities who had completed a four-year course in accountancy and who completes one year or more of work in the employ of the State Auditing Department be eligible to sit for the C. P. A. examination?

*To Honorable Bryan Willis, State Auditor:*

Under section 21.02, Florida Statutes, 1941, the state auditor and the assistant state auditors must be qualified accountants. The state auditor, who is the head of the State Auditing Department, is, in fact, a registered accountant. The work of the state auditor and his assistants is such as certified public accountants customarily perform.

Section 473.08 provides that any person who is a citizen of the United States and has resided in the state at least twelve months immediately prior to his application, is over the age of twenty-one years, of good moral character, a graduate of a high school with four-year course of study, or an equivalent education, and who has had not less than three years' experience in the practice of public accounting and who otherwise meets the qualifications specified in the rules of the State Board of Accountancy, shall be entitled to take the examination for a certified public accountant. The point of the question is whether a competent accountant who is employed by the State Auditing Department for a period of three or more years satisfies the statute which requires the applicant to have "not less than three years' experience in the practice of public accounting." It is my opinion that three years' employment in the State Auditing Department satisfies the quoted requirement of the statute and if the applicant complies with the other conditions and qualifications set out in the statute, he is entitled to sit for the examination.

Section 473.11 provides that any person who has completed a four-year course in accountancy in either of the two Florida universities and thereafter completed one year of work in a registered accountant's office shall be entitled to take the examination for a C. P. A. It is my opinion that one year or more of work as an accountant in the employ of the State Auditing Department satisfies the statute which requires one year of work in a registered accountant's office, and the second question is answered in the affirmative.

## REAL ESTATE LICENSE LAW

January 10, 1947.—047-12.

### APPEAL—FILING—DENIAL OF APPLICATION

**QUESTION:** In which office of clerk of the circuit court should the complete record or certified transcript thereof be filed in the event of appeal by a nonresident applicant, broker or salesman, from an order of the commission denying an application or revoking or suspending a registration?

*To Honorable T. P. Warlow, Jr., Secretary, Florida Real Estate Commission, Orlando, Florida:*

In the event of such an appeal, the record should be filed in the office of the clerk of the circuit court of the county wherein the broker maintains an office, if appellant be a broker; or the county wherein the salesman's employer maintains an office, if appellant be a salesman; or in the county which applicant has stated in application for registration to be his business address, if appellant be an applicant.

Section 475.16, Florida Statutes, 1941, states that:

"Every person shall make application for registration in the form required by the rules of commission, . . ."

Section 475.01, subsection (4), provides that registration "shall consist of the placing and keeping of the name and business address, and if of a salesman, the name and business address of the employer also, upon the list of brokers and salesmen in the offices of the Florida Real Estate Commission, . . ."

Section 475.25 provides that:

"The circuit court may revoke or suspend the registration of any broker or salesman when it is satisfied that said broker or salesman has:

\* \* \*

"(7) Acted as a salesman for or on behalf of, or received compensation from, any other person or broker than the person or broker registered with the commission as his employer;

\* \* \*

"(10) Failed, if a broker, to establish and continuously maintain and register at least one office within this state, or failed to maintain and register such branch offices as may be required by law . . ."

Section 475.17 provides that any previous conduct which would have been ground for revocation or suspension of registration, if the applicant were registered, shall be sufficient grounds for a denial of the application.

In view of the foregoing, I am of the opinion that a broker must maintain an office in this state; that a salesman must be employed by a broker who is registered with the Florida Real Estate Commission; that an applicant for registration must state a business address within this state, and if applying for registration as a salesman must state the name of the registered broker who is to be his employer. These are the reasons for the answer heretofore set forth.

## BEAUTY CULTURE LAW

February 9, 1948.—048-50.

### PRACTICE IN HOME—TIPS—COMPENSATION

**QUESTIONS:** 1. Where a person not having the license required by law to practice beauty culture engages in any one or a combination of

the practices defined in section 477.03, other than upon members of the immediate family of such person, with or without pay, does such practice constitute a violation of law?

2. Where a person not having the license required by law, engages in any one or a combination of practices defined in section 477.03 outside of members of the immediate family of such person, without asking or receiving any compensation therefor, does such practice constitute a violation of the law?

3. Where a person not having the license required by law to practice beauty culture engages in any one or a combination of the practices defined in section 477.03 outside of members of the immediate family of such person, without requiring payment but accepting "tips" therefor, does such acceptance of "tips" constitute payment within the meaning of section 477.03?

4. May any person engage in any one or in any combination of the practices defined in section 477.03 except in the manner and under the circumstances prescribed in subsection (7) of section 477.27?

*To Honorable Wilbur W. Whitehurst, Attorney, State Board of Beauty Culture, Wauchula, Florida:*

(1) Our statute makes it unlawful to "engage in the practice of beauty culture" (section 477.02 (1)). "To engage in" a business has a well-defined meaning at law. It means that employment which occupies the time, attention and labor of the person so engaged in business; it denotes regular and legal employment, not one that is occasional, irregular, or illegal. (Words and Phrases, "Engage," p. 599.) "To engage" is defined as "to embark in a business; to take part; to employ or involve oneself" (Webster's new International Dictionary, quoted in *Roberts v. State*, 7 So. 861). Also see Words and Phrases, "Engage," p. 609.

In my opinion, therefore, if a person not having the license required by law, engages in any one or a combination of the practices defined in section 477.03, with the public, to such an extent that such person could be said to be pursuing the occupation of a beautician (or manicurist or pedicurist), then such person would be violating the Beauty Culture Law.

(2) Whether or not a person receives any compensation for his or her services is unimportant, if such practices are engaged in to such an extent as to amount to the pursuing of the occupation of beauty culture.

(3) The acceptance of "tips" would, in my opinion, amount to an indirect payment, and the third question may be answered in the same way as the first question.

(4) Section 477.27 (7), which prescribes the circumstances under which a beauty shop may be established in a room or place also used for residential or business purposes not connected with beauty culture, does not expressly provide that beauty culture may not be practiced except in the manner and under the circumstances prescribed therein. Being a penal statute, it must be strictly construed, and ought not to be extended by construction. (*Brown v. Watson*, (Fla.) 156 So. 327.)

July 17, 1947.—047-198.

#### BOARD MEMBER AS TEACHER—PROHIBITION

QUESTION: May a member of the State Board of Beauty Culture while continuing as such member, apply to the board for a certificate of registration to practice as a registered beauty culture teacher and be entitled to take the examination provided by law to be given such applicants?



*To Honorable Wilbur W. Whitehurst, Attorney, State Board of Beauty Culture, Wauchula, Florida:*

Although chapter 477, Florida Statutes, 1941, as amended, does not in express terms prohibit such action on the part of the board, it seems to me that such action would be analogous to a contract entered into by a board with one of its own members, which contracts are generally held to be void, or at least voidable, as against public policy. (43 Am. Jur., Section 299, page 106.)

Furthermore, section 477.18, Florida Statutes, 1941, as amended, provides (among other things) that:

"No school owner, operator, manager or teacher or anyone connected in any manner with a school shall be a member of the board."

Undoubtedly, the purpose of this provision was to insure that the members of the board have no personal connection with, or interest in, any beauty culture school. While I do not mean to imply that the obtaining of a teacher's certificate by a member of the board would indicate an interest in, or connection with, any beauty culture school—and I am sure that the members of the board have no such thing in mind—such action might be questioned as a violation of the spirit, if not the letter, of that portion of the beauty culture law quoted.

For the reasons stated, it is my opinion that the question probably should be answered in the negative.

### OUTDOOR ADVERTISERS

October 6, 1948.—048-322.

#### EXEMPTION FROM LICENSE TAX

QUESTION: Where the owner of a business, personally or through his agents and employees, erects and maintains outdoor advertising signs relating solely to the merchandise manufactured or sold by him at his place of business, is he exempt from the provisions of chapter 479, Florida Statutes, 1941, imposing on outdoor advertiser's license?

*To Honorable F. Elgin Bayless, Chairman, State Road Department:*

Section 479.07, Florida Statutes, 1941, providing for the issuance of permit for the construction of advertising structures and outdoor advertising signs, provides that:

"Those signs constructed, erected, operated, used or maintained by the owner or lessee of a place of business or residence, relating solely to merchandise, services . . . sold, produced, manufactured, or furnished at such place of business or residence wherever found shall be exempt from the payment of the license tax provided by this chapter but subject to the provisions herein as to permits."

Applying the statutory provision to the situation presented, the question is answered in the affirmative.

October 6, 1948.—048-323.

#### ABOLITION OF MUNICIPALITY—JURISDICTION OF CHAIRMAN ROAD DEPARTMENT

QUESTION: Upon the abolition of an existing city or town by dissolution of its charter or franchise, does the urban territory formerly located within the said city or town come under the jurisdiction of the state chairman in the administration of outdoor advertising law?

*To Honorable F. Elgin Bayless, Chairman, State Road Department:*

Section 479.03 provides that the territory under the jurisdiction of the state chairman in his administration of the law governing outdoor advertising shall include all of the state outside the corporate limits of any city or town.

Under the constitution and laws of Florida, the power to establish and to abolish municipalities is vested in the Legislature, either directly or indirectly by legislative act. Upon the abolition of a municipality, whether city or town, the corporation ceases to exist and is thereafter divested of the power to perform public duties. Upon the lawful dissolution of a city or town, whether by revocation of its charter or cancellation of its franchise, the territory located within the corporate limits of the municipality, under the provisions of chapter 479, comes under the jurisdiction of the state chairman in his administration of the outdoor advertising law.

### MASSEURS AND MASSEUSES

August 2, 1947.—047-235.

#### STATE SCHOOL—REQUIREMENT OF LICENSE

**QUESTION:** May the Massage Board waive the massage school license fee on behalf of a massage school to be conducted by the Dade County Vocational School, which is a part of the state system of public schools?

*To Honorable George Warney, Secretary-Treasurer, Florida Board of Massage, Miami, Florida:*

Although I have stated the question in the terms presented to me in the letter, as a matter of fact, there is no question here of a "waiver" of the license fee by the board, as the property of the state is, by implication, exempt from the operation of its own tax statutes, unless it is made subject to the tax by express enactment or by clear implication.

My opinion is, therefore, that a massage school conducted by the Dade County Vocational School would be, by implication, exempt from payment of the license fee required by the massage law.

### STRUCTURAL PEST CONTROL

October 15, 1947.—047-332.

#### REGULATION OF PEST CONTROL—CERTIFICATION— OUT-OF-STATE OPERATORS

**QUESTIONS:** 1. Prior to the passage of the Structural Pest Control Act of 1947 there were many individuals and corporations which were licensed by cities and counties to do structural pest control work. Under the Structural Pest Control Act it is required that all operating agencies be under the supervision of a certified pest control operator; certification being made by the Structural Pest Control Board. Is it necessary for the board to certify one individual in each such agency, namely, the individual in charge of the work on July 1, 1947?

2. The board is encountering a number of pest control companies which do not have branch openings in the State of Florida but are licensed in Georgia or some other area. These organizations practice a form of migratory pest control in which they cross the border into northern and northwestern sections of Florida, and perform pest control operations. In handling the certification and the subsequent licensing of such organizations what procedure may the board legally pursue? Is it within the power

of the board to prohibit such migratory practices and make them open branch offices in the State of Florida in order to justify practice in this state?

*To Florida Structural Pest Control Board, Gainesville, Florida:*

When read in its entirety, chapter 24364, Laws of Florida, acts of 1947, appears to be a police measure intended as a regulation of structural pest control operations in this state as a public safety measure. The act is primarily a regulatory law and not a licensing or taxing law for revenue purposes. Although the said act provides a Structural Pest Control Board, the actual enforcement of the act is under the State Board of Health (sections 3-6), the Control Board acting merely in an advisory capacity and as an examining and certifying agency as to the qualifications of applicants for certification (section 7).

Under the act each person, firm or corporation doing a pest control business in this state must place its business operations in charge of a certified pest control operator (section 1), and it is "unlawful for any person . . . to engage in structural pest control or commercial fumigation . . . unless they have been certified by" the pest control board (section 8). Certain agencies and operations are exempted from the operation of the act (section 14); however, neither of the questions are affected by this exemption.

The requirement that each structural pest control operation be in charge of a certified pest control operator does not require special certification of the person in charge, but merely means that such business must be in charge of some person certified by the board pursuant to the provisions of said act. There seems to be but one class of certificates. This seems to answer the first question.

The act requires that all structural pest control operations in this state be performed under the direction of a duly licensed structural pest control operator, unless within the exceptions mentioned in section 14 of the act, operators licensed by other states, or doing business in other states, are not within the exceptions mentioned in said section 14. In order to legally perform structural pest control operations in this state every such operation is required to be in charge of an operator licensed under the laws of this state, unless within the exceptions mentioned in section 14. There is no different requirement in the examination and certification of residents and non-residents; the requirements are the same. Nonresidents may do a pest control business in this state without establishing branch offices in this state, provided their operations are under the direction of a person licensed under the laws of this state. This seems to answer the second question.

December 5, 1947.—047-405.

**ADOPTION OF REGULATIONS—RESIDENT REQUIREMENT**

**QUESTION:** May the Structural Pest Control Board of this state, by rule or otherwise, require that persons doing structural pest control work in this state maintain offices in this state?

*To Florida Structural Pest Control Board, Gainesville, Florida:*

The answer to this question depends upon a construction of the structural pest control law of this state. (Chapter 24364, Laws of Florida, acts of 1947.) Under this chapter, the Structural Pest Control Board, created by section 7 of said chapter, is "to serve strictly as an examining and certifying agency" although the State Board of Health, which is the enforcement agency of the said law, "shall use the structural pest control board in an advisory capacity in the formulation of rules and regulations." (See sections 4 and 7.) I find nothing in the chapter which indicates that the structural pest control board shall act in any capacity, other than an ad-

visory capacity to the State Board of Health, except that of an examining and certifying agency (see sections 7-13), with power to revoke certificates under certain conditions mentioned in section 13.

The Structural Pest Control Board's powers are limited to examination and certification of applicants and to acting in an advisory capacity to the State Board of Health; such powers do not include the making of rules and regulations in connection with the enforcement of the act. The question must be answered in the negative.

The question of whether or not the State Board of Health might, or might not, adopt such a regulation is not involved in this opinion.

## OPTOMETRY

October 25, 1948.—048-334.

### BOARD OF OPTOMETRY—RULES AND REGULATIONS— BRANCH OFFICES

QUESTION: Rule 9 adopted and promulgated by the State Board of Optometry provides: "No Optometrist registered in the State of Florida may conduct a branch office without first receiving a permit for such branch office. Applications for permit for such branch office shall be made to the secretary of the board and the power to accept or reject applications for branch offices and for renewal applications for branch offices lies wholly within the judgment of the Board." Is the foregoing a lawful rule within the rule making power of the board as conferred by statute?

*To Florida State Board of Optometry, Dr. W. F. Davey, Secretary-Treasurer, 325 South Ridgewood Avenue, Daytona Beach, Florida:*

Section 463.11, Florida Statutes, 1941, dealing with the revocation of certificate to engage in the practice of optometry provides in part:

"No Optometrist shall practice optometry in any temporary offices, apart from a regularly established office, under the penalty of revocation of certificate of registration; provided, however, that a registered Optometrist may establish a branch office in accordance with the provisions of this chapter if such branch office be duly equipped with the instruments necessary to make complete Optometric examination as may be determined by said board, and provided further that such branch office is in personal and direct charge of a registered Optometrist."

Section 463.05, dealing with the powers and duties of the board, provides in part:

"The Florida State Board of Optometry shall enforce this chapter and prosecute all violations of this chapter, and make rules and regulations not inconsistent with the provisions of this chapter, governing the practice of optometry, and make such other rules and regulations to carry out the provisions of this chapter as it may consider necessary to the proper performance of its duties."

The statutory provision granting to a registered optometrist the right and privilege to establish a branch office under such conditions and requirements as are provided by the statute may not be restricted or circumvented by a rule adopted and promulgated by the board. The rule making power of the board is specifically limited by statute to such rules and regulations as may not be inconsistent with the provisions of the chapter governing the practice of optometry.

The question is accordingly answered in the negative.



## CHAPTER XXVII

### REGULATION OF TRADE, COMMERCE AND INVESTMENTS

#### MILK, CREAM AND MILK PRODUCTS

July 7, 1947.—047-183.

#### RULES AND REGULATIONS—JURISDICTION

QUESTIONS: 1. Who has the authority to make rules and regulations governing dairies and milk plants?

2. How much authority does each of these two departments, State Department of Agriculture, and State Board of Health, have in enforcing rules and regulations, in inspecting dairies and milk plants, and in giving instructions to dairymen and plantmen regarding improvements in their operations?

3. When surveys are made in any milk shed, who should investigate such surveys?

4. Must the county sanitary officers enforce the regulations adopted by the State Department of Agriculture?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

Under the provisions of section 502.21, Florida Statutes, 1941, the commissioner of agriculture is required to issue rules and regulations necessary to carry out and enforce the provisions of chapter 502, Florida Statutes, 1941. This section was not repealed by chapter 24277, Laws of Florida, 1947.

Section 1, chapter 24277, Laws of Florida, 1947, provides that the provisions of the act shall be enforced under the supervision of the commissioner of agriculture.

It is, therefore, my opinion that the commissioner of agriculture has the authority to make rules and regulations governing dairies and milk plants. The State Board of Health does not have the right to make rules and regulations applying to the production, processing and distribution of milk, cream and milk products, except sanitary practices, and sanitation of establishments where food and drink including milk, cream, and milk products are sold for consumption on the premises where sold, or to the sanitary and healthful conditions of such food and drink sold or offered for sale by such establishments.

In reply to question 2, it is my opinion that the State Department of Agriculture has the responsibility of enforcing the rules and regulations issued pursuant to the provisions of chapter 502, Florida Statutes, 1941, and chapter 24277, Laws of Florida, 1947. The giving of instructions to dairymen and milk plant men regarding improvement in their operations is the responsibility of the State Department of Agriculture.

The inspection of dairies belong to both the State Department of Agriculture and the State Board of Health, for different purposes. The State Board of Health inspection are to determine whether regulatory legislation pertaining to sanitation and sanitary practices are being complied with to protect the public health.

The responsibility of enforcing all regulatory legislation applying to production, processing, and distributing milk, cream and milk products is vested in the State Department of Agriculture.

The responsibility of enforcing all regulatory legislation applying to sanitation and sanitary practices of establishments where food or drink including milk, cream, and milk products are sold for consumption on the premises where sold, or to the sanitary and healthful conditions of such food and drink sold or offered for sale by such establishments, is vested in the State Board of Health.

In reply to question 3, it is my opinion that either the State Department of Agriculture or the State Board of Health may instigate a survey in a milk shed. Section 6, chapter 24277, Laws of Florida, 1947, provides that whenever a survey is made, there shall be the fullest cooperation and exchange of information between the State Department of Agriculture and the State Board of Health.

In reply to question 4, it is my opinion that the county sanitary officers are not required to enforce the regulations adopted by the State Department of Agriculture. The county sanitary officers are employed by the Board of County Commissioners after approval by the State Board of Health. These county sanitary officers may, through cooperation with the Commissioner of Agriculture and the Director of the State Board of Health, enforce the regulations adopted by the Commissioner of Agriculture. It is the Commissioner of Agriculture's responsibility to enforce the regulations.

The Commissioner of Agriculture's regulations are not to supercede local municipal regulations that are in excess to the standards established by the commissioner of agriculture.

I hope that this is the information desired.

July 24, 1947.—047-249.

#### SUPERVISION OF MILK—PRIVATE SCHOOLS— STATE INSTITUTIONS

QUESTIONS: 1. Is the commissioner of agriculture, under the provisions of chapter 502, Florida Statutes, 1941, as amended by chapter 24277, Laws of Florida, 1947, authorized to supervise and regulate the production and distribution of milk products under the following circumstances:

(a) When the milk and milk product is produced by a state institution of learning for consumption only on the campus of the institution by the students and members of the faculty?

(b) When the milk and milk product is produced by privately owned institutions of learning for consumption upon the school premises by the members of the faculty and students?

(c) When the milk and milk product is produced upon the premises of state or federal penal or quasi-penal institutions for consumption only by the personnel and inmates of the institution?

2. What authority do municipal and county milk inspectors have to regulate by inspection, or otherwise, the production and distribution of milk and milk products under the foregoing recited conditions and circumstances?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

The production and distribution of milk, cream and milk products is governed by chapter 502, Florida Statutes, 1941, as amended by chapter 24277, Laws of Florida, 1947. By the terms of the governing statute, regulation is confined to milk and milk products sold, offered for sale or exposed for sale. The purpose of the chapter as set forth in section 502.23 is defined to be:

"This chapter shall be construed as intending to secure to the people of Florida the assurance that milk and milk products sold or offered for sale to the public are produced under sanitary conditions and are wholesome and fit for human consumption and are being offered to the public under their correct designation as to grade and quality and as to source of production."

It was the clear intent of the Legislature in enacting the statutes in question, as announced in the title of the original act (chapter 14762, Laws of Florida, 1931), and as determined from the express purpose quoted above, that the regulation of the production, processing and sale of milk and milk products was confined to such milk and milk products as are sold to the public for consumption in the ordinary channels of trade. This construction has been placed upon the statute by the federal courts.

Under the circumstances set forth in subparagraphs (a), (b) and (c) of Question 1, milk and milk products produced for consumption only by a particular class of persons are not subject to regulation by the commissioner.

As to question 2—under the state law governing the regulation of the production and distribution for consumption of milk and milk products, the several inspectors of municipalities and counties in the state are not vested with any power more extensive than the power which is vested in state inspectors. Neither municipal nor county inspectors are authorized to exercise any regulation of the production, processing or distribution of milk or milk products, except that produced for distribution and sale to the general public through the usual and ordinary channels of trade.

Nothing recited in this opinion is to be construed as an interference in any way with the lawful functioning by the State Board of Health or any similar regulatory agency of the various municipalities in the enforcement of rules and regulations pertaining to the production, processing, sale and distribution of milk and milk products.

### HOTEL COMMISSION

July 3, 1947.—047-189.

#### SALARY—INCREASE—RETROACTIVE CLAUSE

QUESTION: Is the provision contained in chapter 23929, Laws of Florida, acts of 1947, for the payment of additional salary to the hotel commissioner, from January 1, 1947, to the effective date of said act (June 6, 1947), constitutional and valid?

*To Honorable C. M. Gay, State Comptroller:*

Chapter 23929, Laws of Florida, acts of 1947, expressly amended section 509.02, Florida Statutes, 1941, so as to provide that the salary of the hotel commissioner shall be six thousand dollars per annum, instead of four thousand two hundred dollars per annum. The said chapter became a law and took effect on June 6, 1947, but contained a provision that the provisions of said law as amended "shall be retroactive to and including January 1, 1947." The statute in question shows clearly that the Legislature intended the said amendment to have retrospective effect to the first of January 1947, and retrospective legislation is not forbidden in this state (see *State v. Lee*, 156 Fla. 494, 23 So. 2d. 575), however, this act would seem to grant to the hotel commissioner extra compensation after his services have been performed between January 1 and June 6, 1947. This seems to require the application of section 11, article XVI, of the Florida Constitution to the said act and a construction of said constitutional amendment in connection with said act, which constitutional provision provides as follows:

"Section 11. No extra compensation shall be made to any officer, agent, employe, or contractor after the service shall have

been rendered, or the contract made; nor shall any money be appropriated or paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, unless such compensation or claim be allowed by bill passed by two thirds of the members elected to each house of the Legislature."

The House Journal for May 7, 1947, shows that the act passed the House with 59 yeas, and 7 nays, and the Senate Journal of May 22, 1947, shows that the act passed the Senate with 26 yeas, and 1 nay. There were 38 members of the Senate and 95 members of the House at the 1947 session. Two thirds of the members of the Senate voted for passage of the act but only 59 members of the House voted for it, when 64 votes are necessary to meet the requirement of the foregoing constitutional provision, if the latter part of the section is applicable to enactments for extra compensation. If the said latter part of the section is not applicable, then no extra compensation may be allowed, so that in either case it appears that said constitutional provision was not complied with.

In the light of the foregoing facts I must advise the state comptroller not to make payment of any claim for extra compensation, from January 1, 1947, to the effective date of the act, or June 6, 1947, unless directed to do so by a court order or upon an advisory opinion to the governor from the supreme court holding the provision for such payment constitutional and valid.

## HOTELS, RESTAURANTS, APARTMENTS: REGULATIONS

April 1, 1947.—047-92.

### VOCATIONAL TRAINING—UNEXPENDED FUNDS

QUESTION: May the unexpended \$12,500 appropriated by section 511.32, Florida Statutes, 1941, as amended by chapter 22835, Laws of Florida, 1945, for the first year of the current biennium, be used in the second year?

*To Honorable Colin English, State Superintendent of Public Instruction:*

Chapter 22835, Laws of Florida, 1945, amended section 511.32, Statutes of 1941, and included the following appropriation:

"... and provided further that there is hereby appropriated annually for each year of the ensuing biennium the sum of Twelve Thousand Five Hundred (\$12,500) Dollars or as much thereof as may be needed from the surplus funds of the State Hotel Commission to the Dade county board of public instruction for the purpose of furnishing and equipping rooms in the vocational education building in Miami, formerly known as the Roosevelt Hotel, for a hotel and restaurant vocational training program which is open to all qualified students from the state of Florida; such appropriation to be released to the Dade county board of public instruction for the purpose herein authorized only after the plans for using the funds and for making the facilities available for students from any county in Florida have been approved by the State Board of Education."

The purpose of the act was to provide funds for vocational education in the training of hotel employees, and the funds to be used for "the purpose of furnishing and equipping rooms in the vocational education building."

It appears that the appropriation for the first year of the biennium could not be expended on account of inability to obtain materials and labor for completion of the building during the first year but it is now possible to use the money for the purpose set up in the act.



In view of the purposes for which the money was appropriated and under the circumstances of this case, it is my opinion that the State Board of Education may now release all, or any part, of the sum appropriated for the first year of the biennium upon approval by the State Board of plans for using the funds and for making the facilities available for students.

## SALE OF SECURITIES

January 9, 1948.—048-15.

### CERTIFICATE OF INTEREST—DEFINITION OF SALE

**QUESTIONS:** It appears that "X" is operating a "Diving Bell" at Miami Beach, and that he is advertising in the Miami papers for persons to take "Shares" at \$1,000.00 each; that he gives them his note payable one year after date in consideration of a percentage interest in the net profits. He calls this a "loan." He then agrees to give the purchaser a fifty percent (50%) interest in another diving bell to be built by him and operated by him at some indefinite location upon payment of an additional sum and cancellation of the note previously given by him.

1. Is this a certificate of interest in a profit sharing agreement and a security as defined in section 517.02(1), Florida Statutes, 1941?

2. Is this a "sale" as being the disposition of a security for value?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

With reference to question 1, the Florida Supreme Court in *McElfresh v. State*, 9 So. (2d) 277, in referring to the statute in question, holds:

"Statutes of this character are upheld under the police power of the state. Their purpose is to protect the public against fraud and the statute will be given a broad and liberal interpretation to effectuate the purpose."

The phrase "investment contract" as used in section 517.02(1) has been the object of general construction by a great many courts; thus, it has been held that "investment contract" implies the apprehension of an investment, as well as a contract, and in accord with the construction of the term "security" the courts have generally concluded that the phrase "investment contracts" includes agreements whereby the purchasers look entirely to the efforts of other persons to make their investment a profitable one.

The *McElfresh* case, *supra*, referring to similar transactions, held:

"This is not a case of the right of the owner of property to dispose of same. As we view the agreement of sale, the conveyance was made subject to certain restrictions and conditions the effect of which was to invest the vendee's capital in an enterprise which was to remain in the control of the vendor. The evident purpose of the vendee was to reap a profit from her investment. The agreement clearly shows the extent of the profit was to be gauged by efforts of the vendor. These are determinative factors as to whether the agreement is a security within the contemplation of the statute."

The business is to be operated by Diamond from which operation the purchaser of the share looks for a return or profit on his investment. This agreement also provides that at its termination the purchaser may furnish additional money instead of receiving his \$1,000.00 per share back, at which time Diamond will construct a new diving bell to be owned 50% by Diamond and 50% by the purchaser, providing, however, that Mr. Diamond shall at all times operate the bell. It is therefore my opinion

that this transaction, and the security given, is in fact a certificate of interest in a profit-sharing agreement and a security as defined in section 517.02 (1), Florida Statutes, 1941.

With reference to section 517.02 (1), Florida Statutes, 1941, states:

"'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. 'Sale' or 'sell' also includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell directly . . . or . . . by advertisement."

A sale through newspaper advertisement, followed by personal solicitation, is within the statute. (*Robertson v. Business Boosters' Country Club* (1925) 212 Ala. 621, 102 So. 576.) In that case the court said:

"This act for the protection of investors contemplates certain public information on file, the issuance of a permit, and the giving of a bond as indemnity. The publication in evidence is made unlawful. That it was followed up by personal solicitation in the following autumn, and sales consummated thereby, does not relieve such sales of the taint of illegality. Issuing such publication was the beginning of an illegal business, which could not become legal, except by a compliance with the law. It was not necessary therefore to show that actual sales were influenced by these advertisements." (87 ALR 85.)

In my opinion the answer to question No. 2 is in the affirmative, for it is immaterial that the sale is a private sale if the security sold is offered to the public. The advertising does so offer the security to the general public.

March 17, 1947.—047-75.

#### INVESTOR'S SYNDICATE—REGISTRATION

QUESTION: Should the Investors Advisory Institute be required to register with the Florida Securities Commission by virtue of the provisions of section 517.02 (4) (d), Florida Statutes, 1941, as amended?

*To Honorable C. M. Gay, Chairman, Florida Securities Commission:*

The file forwarded to this office includes letters dated February 25 and March 4, 1947, from Javits & Javits, Attorneys, New York City and Washington, D. C., and a so-called "dry-run" report bearing the date of February 9, 1947, which is stated to be typical of future reports of the institute. The "dry run" and letters do not contain specific factual information as to every point which comes to mind, but it is believed that an opinion can be furnished on the basis of the facts that are stated, by indulging in some assumption which seems to be justified thereby. It appears that the institute is a foreign corporation and a wholly owned subsidiary of B. C. Forbes Publishing Company, Inc., a foreign corporation; that the reports will be prepared and published in the State of New York where the institute maintains its only place of business; that the reports contain advice and information from the institute on investment matters and constitute its service; that the reports will be impersonal and standard in the sense that the same reports will be sent to all subscribers; that the service will be advertised in newspapers and periodicals locally and on a national scale and no personal solicitations will be made by salesmen, solicitors or agents in Florida or any other state; that the subscription contracts will be consummated in the State of New York by the use of the mails or other means or instrumentalities of interstate commerce and the reports will be transmitted to the subscribers through the mails, and that

the Institute is registered as an investment adviser with the United States Securities and Exchange Commission under the Investment Advisers Act of 1940.

When the statement of facts outlined in the next preceding paragraph is examined in the light of section 517.02 (4) (d), supra, and other provisions of the Florida "Uniform Sale of Securities Law," the Investment Advisers Act of 1940 (Title 15, Section 80b, et seq., U.S.C.A.), as well as applicable court decisions, the conclusion is inescapable that Investors Advisory Institute is not required to register with the Florida Securities Commission and, therefore, the question is answered in the negative, with the understanding that such answer is restricted to the situation reflected by such facts.

February 19, 1947.—047-50.

#### PROSPECTUS—DISTRIBUTION PRIOR TO REGISTRATION

**QUESTION:** Can the form of prospectus provided by rule 131 of the U. S. Securities and Exchange Commission be distributed lawfully by registered Florida dealers to the public generally in Florida, prior to registration of the securities concerned with the Florida Securities Commission?

*To Honorable C. M. Gay, Chairman, Florida Securities Commission:*

According to release No. 3177 of the U. S. Securities and Exchange Commission, the aforesaid rule is experimental. It is to be effective "for a trial period of six months from December 6, 1946, during which time its operation will be closely studied by the commission to determine whether it should be continued, modified or rescinded," and the introductory paragraph of said commission's formal action reveals that the rule is "primarily in the nature of an interpretation of certain provisions of section 2(3)" of the Securities Act of 1933 hereinafter set forth.

The rule provides that the sending or giving to any person, before a registration statement filed with said commission becomes effective, of a copy of the form of prospectus shall not in itself constitute an "offer to sell," "offer for sale," "attempt or offer to dispose of," or "solicitation of an offer to buy" as used in section 2(3) of such act, provided the form contains substantially the information required by such act and the rules and regulations thereunder to be included in a prospectus for registered securities, except for the omission of information as to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price, and that each page of every copy of the form contains printed in red ink the following statement:

"A registration statement relating to the securities referred to herein has been filed with the Securities and Exchange Commission, but has not yet become effective. Information contained herein is for informative purposes only, and is subject to correction and change without notice. Under no circumstances is it to be considered a prospectus, or as an offer to sell, or the solicitation of an offer to buy the securities referred to herein. No offer to buy or sell any such securities should be made and no order to purchase the securities herein referred to will be accepted unless and until a registration statement under the Federal Securities Act of 1933 relating to the securities herein referred to has become effective."

The question, of course, is confined to those securities which must be registered with the Florida Securities Commission before they can be sold legally in Florida and in reality "boils down" to the proposition of whether the dissemination of the form in the manner described is a "sale" under the laws of Florida.

By section 517.02(3), Florida Statutes, 1941 (Uniform Sale of Securities Law), it is provided that:

"'Sale' or 'Sell' includes every disposition, or attempt to dispose of, a security or interest in a security for value. . . . 'Sale' or 'Sell' also includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell directly or by an agent, or a circular letter, advertisement or otherwise. . . ."

The possibility has been suggested that the distribution of the form would not constitute a "sale" as that word is defined by Florida law, but in viewing this suggestion the arguments to the contrary should be given full consideration. The quoted statement admonishes that the form is not to be considered a prospectus or an offer to sell, or a solicitation of an offer to buy, but the true meaning of, and the reason for employing these admonitions have been obscured by other portions of such statement, for instance, the last sentence of the statement declares that an offer to buy or sell should not be made and no order to purchase will be accepted "unless and until" a registration statement has become effective under the Securities Act of 1933. Said sentence seems to qualify such admonishments and appears to justify the conclusion that the prime purpose of the form is a "solicitation" in anticipation of the Federal registration statement becoming effective. In these circumstances, it is my advice that until a court of competent jurisdiction has decided otherwise, the Florida Securities Commission should take the position that the form of prospectus under discussion cannot be distributed by registered Florida dealers to the public generally in Florida prior to the registration of the securities concerned with your commission.

Because of the foregoing, the second question has been rendered moot and there is no necessity for answering it.

July 25, 1947.—047-217.

#### OIL AND GAS LEASES—JURISDICTION OF COMMISSION

QUESTIONS: 1. Does that part of chapter 24066, acts of 1947, amending section 517.02, Florida Statutes, 1941, by providing that the word "security" shall include "certificate of interest in an oil, gas, petroleum, mineral or mining title or lease, or the right to participate therein," bring so-called "oil royalties" within the purview of chapter 517 of such statutes?

2. Under the decision in *Boyer v. Black*, 154 Fla. 723, 18 So. (2d) 886 and the further amendment of said section 561.02 by said chapter 24066, to exclude the provision "oil, gas and petroleum leases on lands situated outside the state, offered for sale to the public by a dealer or salesman in this state," does the Florida Securities Commission have jurisdiction over the sale of oil, gas and petroleum leases, whether on lands situated in or outside of Florida?

*To Honorable C. M. Gay, State Comptroller:*

(1) It appears to me that the scope of the term "oil royalties" is broader than the instruments intended to be embraced by that part of the quoted provision relating to oil, as there are royalties that do not fall within that part of said provision; therefore, the safest course is to disregard such term and consider the nature of the instruments and transactions involved. For example: If X company secures a lease upon property bearing oil under which lease X is entitled to receive one-eighth of all the oil produced on the leased property and thereafter, in Florida, X sells A, B, and C each a fractional interest in the one-eighth of all such oil and issues and delivers certificates to A, B, and C evidencing such interests, such certificates are within that part of the provision respecting oil and the purview of chapter 517. This should serve to illustrate the gen-



eral coverage and is as far as I can go in the circumstances. Questions arising from actual instruments and transactions will have to be passed upon as and when they are presented.

(2) I think discussion of this question is unnecessary as the same should be and is answered in the negative.

September 29, 1948.—048-317.

EXEMPT SECURITIES—NOTICE OF ISSUANCE—  
NATIONAL SECURITY EXCHANGES

QUESTION: Do securities which are to be listed on a recognized stock exchange "on notice of issuance" come within the exemption provided in section 517.05 (6), Florida Statutes, 1941?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

Subsection (6) of section 517.05, Florida Statutes, 1941, makes provision for the exemption from the operation of chapter 517, Florida Statutes, 1941, of securities appearing in any list of securities dealt in on certain national security exchanges. In order for the securities to be exempt, the securities must have been listed pursuant to official authorization by such exchanges and the exemption extends only so long as such listing remains in effect.

The recognized purpose of the exemptions provided by section 517.05, is to facilitate free trading in securities that have been listed upon the national security exchanges.

The national security exchanges place a qualification upon securities, which are part of a list of securities, that are to be listed upon notice of issuance; this qualification being that there will be no trading permitted upon the exchange until notice of issuance has been received, by the exchange, from the issuer. To permit an exemption, from the operation of the provisions of the Florida security law, of securities that are to be listed upon notice of issuance, would be to exempt from the requirements of the Florida security law, the trading-in of these securities, in Florida, before these securities could be traded-in upon the listing security exchange. For example, the first sale by the issuer of any securities that appear in a list, being the original issuance of the particular security, would be an exempt transaction prior to the receipt of notice of issuance by the exchange and therefore an exempt transaction of unlisted securities; the exemption would be predicated upon a listing that was not complete.

Securities are not to be exempt under the provisions of section 517.05 (6), from the operation of the Florida security law until listed on one of the enumerated national security exchanges. However, when listed, such securities remain exempt so long as the listing remains in effect. In instances where securities are to be listed "upon notice of issuance" the listing is not completed until the exchange receives notice from the issuer that the security has been issued. It is difficult to understand how "upon notice of issuance" securities could remain exempt so long as the listings remain in effect, before the notice of issuance; for there is no listing in effect until after notice to the exchange that the security has been issued.

Construing the language of the whole of section 517.05 (6), it is my opinion that the question must be answered in the negative; that is to say, securities that are listed "upon notice of issuance" on one of the national security exchanges set out in section 517.05 (6), Florida Statutes, 1941, are not included in the exemptions therein provided.

October 13, 1947.—047-352.

PRIVATE CORPORATION—PUBLIC UTILITIES—  
NON-EXEMPT SECURITIES

QUESTION: Under the facts hereinafter delineated, are the securities of X corporation exempted by section 517.05 (4), Florida Statutes, 1941, from the application of chapter 517 of said statute?

*To the Florida Securities Commission:*

X is a private corporation organized under the laws of the State of Delaware and transmits natural gas by pipe line over and through the states of Texas, Louisiana, Arkansas, Mississippi, Tennessee, Kentucky and West Virginia. It appears that X does not sell or offer for sale any gas to the public, directly or generally, for any use, but rather that it sells its gas at wholesale only under sales contracts to private non-affiliated gas companies in the last two mentioned states; that said non-affiliated gas companies resell said gas to still other corporations and that the latter corporations again sell the gas to "ultimate consumers." The identity of the ultimate consumers is not disclosed. The rates and charges of X are subject to the regulations of the Federal Power Commission under the Natural Gas Act.

Section 517.05 (4) provides that the provisions of chapter 517 shall not apply to:

"Any security issued or guaranteed either as to principal, interest or dividend by a corporation owning or operating a railroad or any other public service utility; provided, that such corporation is subject to regulation or supervision either as to its rates and charges or as to the issue of its own securities by a public commission, board or officer of the Government of the United States. . . ."

Since the rates and charges of X are subject to the regulations of a public commission of the federal government, the only question remaining to be answered is whether X is a "public service utility." The Supreme Court of Florida has never passed on the point involved, but upon the basis of my research it seems that under the factual situation stated, X cannot be considered a public utility. Certainly, there is great doubt that it is such a utility. Therefore, it is my advice that unless and until a court of competent jurisdiction holds to the contrary, the position should be taken that the securities of X are not exempt from the application of chapter 517 by virtue of the quoted provisions of section 517.05(4).

October 20, 1947.—047-358.

FOREIGN CORPORATION—EXEMPTION OF SECURITIES—  
REGULATION OF RATES

QUESTION: Is a corporation organized under the laws of a foreign country, which is a foreign air carrier within the meaning of the Civil Aeronautics Act of 1938, as amended, entitled to have its securities exempted from the application of chapter 517, Florida Statutes, 1941, as amended, by reason of the provisions of section 517.05 (4) of said statutes hereinafter quoted?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

The pertinent provisions of the aforesaid section 517.05 (4) are that said chapter 517 shall not apply to

"Any security issued or guaranteed either as to principal, interest or dividend by a corporation owning or operating a railroad or any other public service utility; provided, that such corporation

is subject to regulation or supervision either as to its rates and charges or as to the issue of its own securities by a public commission, board or officer of the government of the United States. . . ."

From a consideration of the Civil Aeronautics Act of 1938, as amended, and particularly that part thereof found in title 49, U.S.C.A., chapter 9, paragraphs (2), (19), (20) and (21) (c) of section 401 and paragraphs (d) and (f) of section 642, it appears that the Civil Aeronautics Board has limited authority in the regulation and supervision of the rates and charges of foreign air carriers and does not have complete regulation or supervision of such rates and charges. It seems to me that if the Legislature of Florida had intended that a corporation should be entitled to the exemption when its rates and charges are subject only to limited regulation or supervision, the Legislature would have so stated in language which would indicate such an intention. The language quoted does not appear to me to indicate any such intention; therefore, unless and until a court of competent jurisdiction holds otherwise it is my opinion and recommendation that the Florida Securities Commission should take the position that the securities in question are not exempt from the application of chapter 517 because of the quoted provisions of section 517.05 (4).

June 19, 1947.—047-171.

#### AMENDMENT—ERRORS IN SPELLING—MEANING

QUESTION: Section 5 of chapter 24066, Laws of Florida, acts of 1947, contains two errors which have provoked inquiries as to the validity of such section and created doubt as to the meaning of those parts of such section affected thereby. Will you render an immediate opinion to obviate such doubt and to enable the commission to promptly dispose of any further inquiries in this connection?

*To Honorable C. M. Gay, Chairman, Florida Securities Commission:*

1. The first part of section 5 reads as follows:

"Section 5. That section 517.09, Florida Statutes, 1941, is amended to read as follows:

519.09 Registration by qualification.—"

It will be noted that the error consists of the designation of section 517.09 as 519.09. The chapter in question is entitled an act to amend, among others, "Section 517.09, Florida Statutes, 1941, all relating to the sale of securities and being a part of Chapter 517 of said statutes, by providing for definition of terms, exemptions, and the registration of certain securities by 'notification' and 'qualification' under said chapter. . . ." Section 517.09 is the only section of said statutes governing the registration of securities by qualification. There is no chapter 519, Florida Statutes, 1941, said chapter number having been reserved for future expansion of said statutes, and, consequently, there could be no section 519.09. Therefore, the conclusion is justified that it was the intention of the Legislature to amend section 517.09 and it is my opinion that section 5 of chapter 24066 is such an amendment and that said typographical error does not affect the validity thereof. This conclusion and opinion are so plainly in line with accepted principles of statutory construction that no citation of authority is necessary.

2. Section 517.09(3) (e), as the same appears in section 5 of chapter 24066, reads as follows:

"A statement of the amount of the issuer's income, expenses, and fixed charges during the last fiscal year, of if in actual business less than one year, then for such time as the issuer has been in actual business."

The question concerning the quoted sub-paragraph arises through the use of the word "of" immediately before the word "if." In amending a section of our statutes it is necessary to repeat the whole of the section, irrespective of the nature or extent of the amendment, in order to comply with the requirements of our state constitution. It so happens that said sub-paragraph was not changed at all in amending said section (other than by the error under discussion) but was included in the amendment of the section to meet the requirements of such constitutional provision. Prior to the enactment of chapter 24066 the sub-paragraph was worded as quoted above except that instead of the questionable word "of," the word "or" was used. Before the amendment the sub-paragraph made full sense but by employing the word "of" instead of "or" in the amendment, the amendment appears to be an absurdity. The insertion of the word "of" in the amendment is obviously a typographical error, and there would seem to be no doubt that the sub-paragraph was intended by the Legislature to read as follows:

"A statement of the amount of the issuer's income, expenses, and fixed charges during the last fiscal year, or if in actual business less than one year, then for such time as the issuer has been in actual business."

I think I am clearly within the proper rule of construction as far as this error is concerned (50 Am. Jur. 269, Section 284; 59 C.J. 991, Section 591; *Frontier Milling & E. Co. v. Roy White Co-op. M.Co.*, 138 Pac. (Idaho) 825), and it is recommended that henceforth such sub-paragraph be interpreted and treated as last quoted in the transaction of the business and functions of the commission.

December 11, 1947.—047-415.

#### REGISTRATION OF SECURITIES—SALE OF SECURITIES

QUESTION: In the circumstances hereinafter related, is it necessary that the securities of "X" corporation be registered with the Florida Securities Commission under Section 6 of chapter 24066, arts of 1947, before they can be sold in Florida?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

In request for opinion, it is disclosed that "X" filed an application with the commission for the "registration by qualification" under section 517.09, Florida Statutes, 1941, of certain common stock issued by said corporation; that the registration was completed on July 1, 1946, and said security was listed as registered. No notice of intention to sell the securities was received by the commission until October 23, 1947, when notice pursuant to section 517.12, Florida Statutes, 1941, was received from a registered Florida dealer of his intention to sell securities that are a part of said issue. No further order of the commission concerning said securities has been entered.

Chapter 24066 became a law on June 16, 1947, and section 6 thereof provides for the "registration by announcement" of certain securities, a new method of registration which need not be discussed.

It appears that said securities were actually registered on July 1, 1946 (prior to the enactment of chapter 24066), with the commission in accordance with section 517.09, and it is provided by subsection (7) of the latter section that the security so registered may be sold:

"by any registered dealer who has notified the commission of his intention so to do, in the manner provided in section 517.12, subject, however, to the further order of the commission."

In the foregoing circumstances there would seem to be only this query: Did the passage of section 6 of chapter 24066 necessitate the fur-



ther registration of such securities pursuant thereto, before they can be sold legally in Florida? An examination of said section reveals nothing indicating that the Legislature had any such intention.

It is my opinion, therefore, that the securities need not be registered again under said section 6, and that they can be sold by a registered Florida dealer giving notice as required by section 517.12, unless and until there is some further authorized order of the commission to the contrary.

December 15, 1947.—047-430.

#### PUBLIC OR PRIVATE SECURITIES—ORIGINAL MARKETING

QUESTIONS: 1. Must there have been a public offering of the securities by the issuer, or an underwriter on behalf of an issuer, to entitle the securities to registration by announcement under section 6 of chapter 24066, acts of 1947?

2. Has there been an "original marketing" within the meaning of said section 6 when a company is incorporated and issues its authorized stock to the subscribers to its certificate of incorporation according to the statement in said certificate of the number of shares such subscribers agree to take?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

The aforesaid section 6 provides for the registration by announcement of securities that "... have been outstanding and in the hands of the public for not less than one year as the result of prior original marketing by the issuer, or by an underwriter on behalf of an issuer. . . ."

It would appear that the Legislature intended the marketing of the securities to be "public" as contradistinguished from "private" and that such marketing would of necessity include a public offering; consequently, the first question is answered in the affirmative.

On the basis of the foregoing, it is my belief that the securities in the hands of the subscribing incorporators would not be in the hands of the public as the result of prior original marketing and, therefore, the second question is answered in the negative.

The third question is hypothetical to the extent that there is a strong probability that the commission will never be confronted with the necessity of having the same answered. I consider it inadvisable to undertake to lay down rules governing conjectural points, and recommend that the Securities Commission wait until an actual question arises and then present same, at which time I shall endeavor to render an opinion with respect thereto.

April 6, 1948.—048-122.

#### SECURITIES REGISTRATION—SALE—REVALUATION

QUESTIONS: 1. Should the Florida Securities Commission accept a notice, as outlined below, of February 17, 1948, and allow a registered dealer "to sell and trade in" stock, as outlined below, at any price less than \$20.00 per share when the original permit issued for sale thereof limited the sale price to not exceeding \$12.50 per share?

2. Should the commission require the registration of all securities for the purpose of trading by dealers to be registered by announcement under the provisions of section 6, chapter 24066, acts of 1947, when sales are to be made at a price higher than the limitation in the permit issued?

3. Does the notice provided in the last paragraph of section 517.12, Florida Statutes, apply to issues of securities which have been completely sold out under the original registration?

4. Does the notice provided by section 517.12, Florida Statutes, apply to any securities which have ever been registered with this commission regardless of the lapse of time?

*To Honorable J. Edwin Larson, Chairman, Florida Securities Commission:*

It appears from the facts set forth in request of February 23, 1948, that on May 7, 1947, a Florida registered dealer registered by notification 3,000 shares of the \$1.00 par value common stock of the subject corporation at a price not to exceed \$12.50 per share, this being a new issue just registered with the securities and exchange commission. On February 17, 1948, another Florida registered dealer notified the commission as provided by section 517.12, Florida Statutes, 1941, of its intention to "sell and trade in" the common stock of the subject corporation at a price not to exceed \$20.00 per share.

At the time of the registration aforementioned, such corporation had outstanding in the hands of the public as a result of prior original marketing approximately 1,250,000 shares of common stock which was then and now is entitled to registration by announcement under the provisions of section 6, chapter 24066, acts of 1947.

The issue of 3,000 shares, however, has not been outstanding for the period of one year required by statute to entitle it to registration by announcement.

I understand that the notice under date of February 17, 1948, supra, involves the 3,000 shares registered May 7, 1947.

Question No. 1 is answered in the negative. To accept this notice and permit for the dealer to sell and trade in this security at a price not to exceed \$20.00 per share would be in direct contravention of the original permit issued for sale thereof limiting the sale price not to exceed \$12.50 per share.

Question No. 2 is answered in the affirmative. It must be borne in mind, however, that the registration under question No. 2 could not apply to the 3,000 shares involved in question No. 1 inasmuch as this stock has not been outstanding and in the hands of the public for not less than one year.

Questions 3 and 4 are answered in the affirmative.

July 28, 1947.—047-233.

#### CONTINUATION CERTIFICATE—BOARD—DEALERS

QUESTION: Should the Florida Securities Commission accept the continuation certificate described herein under the conditions hereinafter enumerated?

*To Honorable C. M. Gay, State Comptroller:*

It appears from the letter and files of the commission that at the time X was registered as a dealer he filed with the commission a bond as required by section 517.12, Florida Statutes, 1941, such bond being in the form provided by section 517.13 of such statutes. The form of bond set forth in the latter section indicates clearly that the dealer is the principal, that he should be so designated in the bond, and that it is contemplated the same is to be executed by him as well as the surety. The bond filed by X was so drafted and in addition to being executed by him as principal was also executed by Y surety company as surety.

Upon the expiration of the said bond on May 31, 1947, Y filed with the commission a "Continuation Certificate" for the period from June 1, 1947, to June 1, 1948, instead of a new bond for such period. Said certificate recites a premium of \$75.00; that it is in favor of the governor of

Florida and in this particular identifies the governor in the language of the statute and also the wording of the original bond; that the same is "On behalf of" X, and that:

"In consideration of the premium herein stated, the (Y company) hereby continues in force, for the period described, the bond designated above, subject to all the agreements, limitations and conditions thereof and provided that the liability under said bond and all continuations thereof shall not be cumulative."

The certificate is executed only by Y, is not signed in any manner by X and there is nothing to indicate or show that X is continued as principal under the certificate, unless the aforementioned statement "On behalf of" X can be so construed. The only designation therein of the bond continued reads: "Bond No. 23454-12-412-47." Said bond number nowhere appears on the original bond. In fact the certificate fails to identify the original bond and the only thing in the original bond that appears in the certificate, other than the aforesaid reference to the governor, is the name of X.

There is nothing in the statutes requiring that a dealer file each year the form of bond provided by section 517.13, the only requirement with respect to such form being that it be filed upon the registration of the dealer. The use of continuation certificates in matters of this kind is not uncommon and they should be acceptable if they otherwise accord with the provisions of law. However, it is my belief that the Legislature intended for the dealer to be designated in, and execute the bond required as principal and that the commission should not accept any bond or continuation thereof which does not meet this requirement. If it were not for the other factors involved herein it might be permissible in the instant case for the commission to receive a written agreement from X accepting the terms of the certificate as principal—such agreement either being endorsed upon the certificate itself or made by a separate instrument. Here, though, we are confronted with a certificate, which in my judgment, does not properly identify the bond it is supposed to continue in force; therefore, it is my advice that you return the certificate to Y with the request that it either submit a new bond in the form provided by section 517.13 or a new continuation certificate meeting and overcoming the objections stated.

## SALE OF LIQUID FUELS

September 27, 1947.—047-323.

### DEALERS IN LIQUID GAS—ULTIMATE CONSUMER— MANUFACTURERS OF GAS

QUESTION: Is the manufacturer of coal gas, holding a municipal franchise for distribution of such product through its mains, and which at certain periods introduces into its mains liquefied petroleum gas (butane or propane), aerated through a process, along with its regularly manufactured gas for distribution, and which maintains tanks for the storage of such liquefied petroleum gas prior to said use, a "dealer in liquefied petroleum gas," as such words are defined and used in chapter 24302, Laws of Florida, acts of 1947?

*To Honorable J. Edwin Larson, State Fire Marshal:*

Section 1 (3) of said chapter 24302, defines a "dealer in liquefied petroleum gas" to be, "Any person selling or offering to sell any liquefied petroleum gas to the ultimate consumer for industrial, commercial or domestic use."

Section 1 (5) of said chapter 24302 defines an "ultimate consumer" to be, "The person last purchasing liquefied petroleum gas in its liquid state for industrial, commercial or domestic use."

Without going further into the provisions of chapter 24302 as related to the foregoing question, the words "in its liquid state" in the preceding paragraph require the finding that the manufacturer of gas described in the question is not a "dealer in liquefied petroleum gas," as such words are defined and used in said chapter 24302.

October 18, 1947.—047-348.

#### OUT-OF-STATE MANUFACTURERS—LIABILITY OF MANUFACTURES

QUESTION: 1. Are out-of-state manufacturers of equipment or appliances for the use of liquefied petroleum gas, who sell and deliver in interstate commerce such products directly to distributors or other users thereof within this state, subject to the licensing provisions of chapter 24302, Laws of Florida, acts of 1947?

2. Are such manufacturers subject to the other regulatory features of said act relating to manufacturers of such products who offer for sale or sell the same within this state?

*To Honorable J. Edwin Larson, State Fire Marshal:*

Chapter 24302 is a comprehensive regulatory act concerning the handling, storage, delivery and use of liquefied petroleum gas, and the types of containers, tanks, bottles, apparatus, appliances and equipment used in connection therewith.

Sections 2 and 3 of the act require each manufacturer of such appliances and equipment for use of such gas, who sells or offers for sale such products in this state, to procure a license from the state fire marshal and to pay for such license and each annual renewal thereof the "fee" of \$35.00.

Section 5 of the act requires that the state fire marshal shall make, promulgate and enforce regulations setting forth minimum general standards covering the design, construction, location, installation and operation of "equipment . . . for utilizing liquefied petroleum gases."

Section 7 of the act makes it unlawful for any person, firm, association or corporation to violate any of the provisions of the act or the regulations of the state fire marshal promulgated in pursuance thereof.

Recently, this office held in an opinion to the state comptroller that the fees required by the act were for revenue purposes and in the category of occupational license taxes, insofar as the act evidenced, as distinguished from regulatory taxes reasonably related to the cost of administering the act. The license provided by the act, which appears to issue without any particular qualifications of the applicant, would seem merely to evidence payment of the license fee required. Viewed in this light, an attempt to impose the tax on the manufacturers contemplated by the questions would constitute an attempt to impose an unlawful burden upon interstate commerce. Numerous cases on the point could be cited; however, only the case of *Osborne vs. State*, 33 Fla. 162, 14 So. 588, 41 L. Ed. 586, is mentioned as an example.

In view of the foregoing, in my opinion the questions are properly answered in their numbered order as follows:

1. Manufacturers of equipment and appliances, who sell and deliver the same to distributors or other users in this state in the channels of interstate commerce, as contemplated by this question, cannot be required to pay the fee or license tax prescribed by the act in connection with such sales and deliveries in this state.

2. It is assumed that in pursuance of section 5 of the act, the state fire marshal has prescribed adequate regulations setting forth minimum general standards concerning the design, etc., of such equipment for utiliz-



ing liquefied petroleum gas, and the sale, installation and use thereof in this state. Should such an out-of-state manufacturer ship and deliver into this state equipment and appliances failing to meet such minimum standards, aside from possible penalty therefor which might be visited upon him, such products would be subjected to appropriate regulations related to the re-sale, installation and/or use thereof in this state.

November 17, 1948.—048-346.

#### LIQUEFIED GAS—INSTALLATION OF EQUIPMENT— MUNICIPALITIES

**QUESTION:** May the City of New Smyrna Beach, by agreement, appoint persons who are not city employees as agents of the city to install all appliances for use of said gas, sold by the city, at the site of the ultimate consumer?

*To Honorable J. Edwin Larson, State Fire Marshal:*

The statutes relating to liquefied petroleum gases and the installation of equipment for its storage and use (see sections 526.12 to 526.20, 1947 Cum. Supp. to Florida Statutes, 1941), are a police measure intended for the protection of the public against the misuse of such gases and the improper installation of equipment for the use thereof. The statute should receive such a construction as will accomplish this purpose and make effective the protection to the public intended by said statutes. Questions of public safety are subject to the exercise of the police power of the state (16 C. J. S. 553, section 184).

The said liquefied petroleum gas statutes appear to apply to "every natural person, firm, copartnership or corporation" (section 526.12 (2) of the statutes), which terms do not usually include municipal corporations (see 9 Words & Phrases 712 et seq.); however, this is not always true (City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744). In this case the term corporation used in a title to an enactment was construed to include municipal corporations. When I consider the entire statute and the intent and purposes of it, I do not think that the Legislature intended to exclude municipal corporations from the purview of said enactment when selling gases and installing equipment within the purview of the statute. Whether or not a municipal corporation may engage in such business would seem to depend upon the terms and extent of its powers under its charter. This would seem to be a local question.

A cursory examination of the charter of New Smyrna Beach (chapter 22408, Laws of Florida, acts of 1943), fails to reveal any provision therein requiring that installations of appliances for the use of liquefied gas or similar work be done by and through municipal employees. This being true, there would appear no reason why such installation might not be done on contract with the municipality; however, such contractors would seem to be required to comply with the requirements of said sections 526.12 et seq., as they would seem to be persons engaged in the business of installing such equipment within the purview of the statutes. It seems that any persons installing such equipment for the municipality would be acting either as an employee of the municipality or as an independent contractor.

The question should be answered in the affirmative, with the qualification that such persons appointed by the municipality be persons qualified under sections 526.12 et seq., of the statutes.

November 24, 1948.—048-348.

#### SALE OF LIQUEFIED GAS—DEALERS, BROKERS, ULTIMATE CONSUMER—INTERSTATE COMMERCE

**QUESTIONS:** 1. Where a person in this state, at the request of another dealing in liquefied petroleum gas or of the federal government for

use in connection with its housing project on a military reservation, directs the producer of said gas in another state to furnish a large amount of such gas to such dealer or the government; is such person a dealer in liquefied petroleum gas within the definition contained in section 526.12 of the Florida Statutes?

2. If such person is not a dealer in liquefied petroleum gas but a merchandise broker, does he represent the purchaser or seller of such gas?

3. Is such transaction one in interstate commerce?

*To Honorable J. Edwin Larson, State Fire Marshal:*

Under the definitions contained in section 526.12, Florida Statutes, "any person selling or offering to sell any liquefied petroleum gas to the ultimate consumer for industrial, commercial or domestic use" is a dealer in liquefied petroleum gas, and "the person last purchasing liquefied petroleum gas in its liquid state for industrial, commercial or domestic use" is the ultimate consumer. A dealer in the gas is not an ultimate consumer. It is presumed that the federal government when it furnishes the gas to an occupant of a unit in its housing unit in effect charges for the same either by direct charge, as a part of the rental or as a part of the compensation of the person using the unit; if this presumption is correct, the government is not an ultimate consumer of the gas. Even if the government might be the ultimate consumer of the gas, there is doubt that the aforementioned definition of an ultimate consumer applies to the federal government (59 C. J. 1103, section 653); furthermore, the gas appears to be used by the government upon a military reservation under the jurisdiction of the United States and not of the state. In the light of these observations, it seems that the first question must be answered in the negative.

The person who orders the gas from the producer, at the request of the purchaser, appears to probably be a merchandise broker (see 9 C. J. 510, section 6; 27 Words and Phrases 83 et seq.); however, that question may be determined only from all the facts surrounding the transactions. Ordinarily, a broker represents only one party to the transaction until the deal is concluded (8 Am. Jur. 1012, section 52); however, the information contained in the request for opinion is not sufficient for the determination of this question. Until furnished with further information the second question may not be answered.

If the gas in question is shipped by a producer in another state to a purchaser in this state (it makes no difference which party the broker represents), the transaction would be one in interstate commerce until the tank car or other shipping container comes to rest in this state and loses its interstate character. After the container loses its interstate character it is subject to state jurisdiction, unless it is in the hands of the federal government or on a federal reservation over which the state has no jurisdiction. This seems to answer the third question.

November 17, 1948.—048-344.

#### LIQUEFIED GAS—INSTALLATION OF EQUIPMENT— NAVIGABLE WATERS

**QUESTION:** Is a person, firm or corporation installing equipment for use of liquefied petroleum gas on boats located in the navigable waters within the boundaries of Florida, subject to the provisions of chapter 24302, Laws of Florida, acts of 1947?

*To Honorable J. Edwin Larson, State Fire Marshal:*

The statutes relating to liquefied petroleum gases and the installation of equipment for its storage and use (see sections 526.12 to 526.20, 1947 Cum. Supp. to Florida Statutes, 1941), are a police measure intended for the protection of the public against the misuse of such gases and the im-

proper installation of equipment for the use thereof. The statute should receive such a construction as will accomplish this purpose and make effective the protection to the public intended by said statutes. Questions of public safety are subject to the exercise of the police power of the state (16 C. J. S. 553, section 184).

The improper use of liquefied gases, and the improper installation of equipment for its use, upon boats using any of the navigable waters of this state would tend to endanger other persons and boats using such waters, and, at least when such boats were near the shore, persons and property along the shore. The power of the state over navigable waters within its boundaries extends to the enactment and enforcement of reasonable police regulations necessary to preserve the common right of all who use such waters (56 Am. Jur. 662, section 200,) so long as such regulations do not conflict with some federal rule or regulation relating to navigation.

I am, therefore, of the opinion that the Florida Legislature, when it enacted sections 526.12 to 526.20, Florida Statutes, intended that such statutes apply to navigable waters within the jurisdiction of the state.

The question should be answered in the affirmative.

## CHAPTER XXVIII

### LIQUORS AND BEVERAGES

#### BEVERAGE LAW

July 24, 1947.—047-215.

##### AUTHORITY TO ISSUE LICENSE—EFFECT OF LAW

**QUESTION:** Under the facts hereinafter enumerated, is the director of the State Beverage Department authorized under chapter 24273, acts of 1947, to approve the application of X for a license to sell liquor?

*To Honorable James T. Vocelle, Director, State Beverage Department:*

It appears that during the month of December, 1936, X obtained a license for the sale of liquor at a location on property in Escambia county not within the limits of an incorporated municipality; that said license was renewed continuously thereafter until revoked by the director of the State Beverage Department on April 23, 1946, for the reason that said location was within the prohibited distance from a public school as provided by section 561.44, Florida Statutes, 1941; that X filed suit in equity against said director in the court of record of such county seeking to set aside such order of revocation, but on October 7, 1946, the court upheld said order and dismissed the proceedings, and that no appeal has been taken from the court's decision. Section 561.44 was amended by chapter 23746, acts of 1947, but X would still not be entitled to a license at said location under the provisions thereof; however, after the passage of chapter 23746, the Legislature enacted chapter 24273, which the request for opinion states was apparently for the purpose of authorizing the issuance of a license to X.

By chapter 24273 the Board of County Commissioners and the director of the State Beverage Department "are required to approve and direct the issuance of a license authorizing the sale . . . of intoxicating liquor at any location, in any county" within the population extremes of 87,000 and 112,350 by the latest state or federal census, "at which the person applying for said license shall have conducted such business under ten annual licenses heretofore issued by the State of Florida and the county where the business is located, authorizing the sale of intoxicating liquors during the period from October 1, 1936, to September 30, 1946; provided such applicant shall be personally eligible for a license and shall be the owner of the property where the business is to be conducted."

There seems to be nothing in the statement of facts which, in my judgment, would be upheld by a court as constituting a personal ineligibility of X for a license, and since nothing is said as to whether X is the owner of the property where the business is to be conducted I suppose that point is not involved. With the elimination of these provisions from further consideration, and, as no precise question is stated, it appears that the only thing remaining to be dealt with is the inquiry implicit in the enumeration of facts, namely: is chapter 24273 valid?

This office has followed the policy of not passing upon the constitutionality of legislative enactments after they have become law, for which reason I cannot give an opinion as to the validity of chapter 24273. The holding of the Florida Supreme Court is that a ministerial officer should not take it upon himself to nullify an act of the Legislature. In these circumstances, I can only recommend that the director of the State Beverage Department is authorized to approve the application of X, provided X meets all the requirements of said chapter and the other statutes controlling the issuance of beverage licenses.



June 17, 1948.—048-212.

POWERS COUNTY COMMISSIONERS—ZONING—  
ALCOHOLIC BEVERAGES

QUESTIONS: 1. Are the county commissioners of any county of the State of Florida, in establishing zones or areas under the provisions of section 561.44 (2) Florida Statutes, 1941, wherein vendors licensed under subsections 3 through 8 of section 561.34, Florida Statutes, 1941, are prohibited from conducting such business, restricted as to the size or boundaries of such zones or areas?

2. What is the effect of such zoning regulations as to existing business establishments operated by vendors holding such licenses within such zones or areas?

*To Honorable Thos. L. Glenn, Jr., County Attorney, Sarasota, Florida:*

Section 561.44 (2) Florida Statutes, 1941, provides as follows:

"The board of county commissioners of any county of the State of Florida may hereafter, by resolution, establish zones or areas, in the territory lying without the limits of incorporated cities or towns, wherein the location of a vendor's place of business licensed under section 561.34 may be permitted to be operated; provided, however, such power shall not apply to vendors licensed under paragraph (b) of subsection (1) of section 561.34, Florida Statutes, 1941, and no license shall be granted to any such licensee to conduct a place of business in a location where such place of business is prohibited from being operated by such resolution; provided, however, that no license under subsections (3) to (8), inclusive, of section 561.34 shall be granted to a vendor, in the territory lying without the limits of incorporated cities or towns, whose place of business is within two thousand five hundred feet of an established church or school (which distance shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the nearest point of said place of business to the nearest point of the church and), in the case of a school, to the nearest point of the school grounds in use as part of the school facilities."

I do not pass upon the constitutionality of this section or any part thereof.

Your attention is particularly called to that portion of the quoted act providing "in the territory lying without the limits of incorporated cities and towns." No further restriction is placed upon the size or location of the area or areas to be included in such prohibited zones.

Question No. 1 is, therefore, answered in the negative, except insofar as such zone or area might encroach upon territory within the county located within incorporated cities or towns, the county commissioners having no regulatory powers to zone such areas.

Section 561.44 (2) *supra*, clearly authorizes county commissioners of the various counties to regulate the sale of alcoholic beverages, outside incorporated cities and towns, and within established zones or areas of the county.

A license bestows upon its holder only a special privilege to do something which, without it, he had no right to do. There seems no justification for the guaranty of security for persons in business at the time restricted zones or areas are established, for persons engaged in the sale of alcoholic beverages, or about to become engaged in such business, do so with full knowledge of the powers of the Legislature to make further and other regulations as its judgment and discretion shall dictate. It is not a violation of the vested rights of the licensee to further regulate or cancel

the licenses previously issued. (See *State vs. Fuller*, 182 So. 888, *State vs. Fuller*, 187 So. 148, and *Mears vs. Stone*, 10 So. (2d) 487.)

It is therefore, my opinion that should the county commissioners of any county of the State of Florida by resolution establish zones or areas in territories lying without the limits of incorporated cities or towns wherein no place of business licensed under subsection 3 to 8, inclusive, of section 561.34 shall be conducted would cancel and terminate the licenses of vendors located in such zones or areas. It must be borne in mind that licenses issued under subsection (1) (b) section 561.34, Florida Statutes, 1941, are not affected by the establishment of the zones or areas referred to.

Those powers granted to the county commissioners of the counties of the State of Florida empower them to designate zones or areas wherein intoxicating beverages may not be sold. These zones and areas would be in addition to those areas lying within 2500 feet of an established school or church and those lying within 300 feet of the nearest property line of any public housing project constructed by or with the aid of federal funds as provided in section 561.44 (2) (3), Florida Statutes, 1941.

July 23, 1947.—047-223.

#### MUNICIPAL LICENSES—LIMITATIONS.

QUESTIONS: 1. In the light of chapter 24447, acts of 1947, is the director of the State Beverage Department authorized at the end of the present license year to approve the renewal of more than six licenses in the City of Coral Gables?

2. In the light of the aforesaid chapter, can transfers of the existing beverage licenses in said city be made to the purchasers of the businesses covered by such licenses?

*To Honorable James T. Vocelle, Director, State Beverage Department:*

You advise that when said act is considered with the state census for 1945 (seventh census of the State of Florida) the city of Coral Gables is entitled to six licenses of the type described therein while twenty-nine such licenses are outstanding at the present time.

It is difficult to discuss the inquiries intelligently without bringing into focus uncertainty as to the validity of the act by reason of its title, but I shall refrain from further development of this idea insofar as I am concerned because of the policy of this office not to pass upon the constitutionality of legislative enactments after they have become law. The position of the Supreme Court of Florida is that no ministerial officer should take upon himself the responsibilities of nullifying an act of the Legislature.

However, it will be noted by section 1 of the act that the same does not limit, generally, the number of licenses to be granted in Coral Gables but that the limitation is placed upon the number of licenses which may be "granted by" such city. It would seem then, that the limitation relates to municipal licenses and in that particular is a matter between the City of Coral Gables and the holders of outstanding licenses; that such limitation does not operate to restrain the renewal or transfer of existing state and county licenses. I do not state that *Singer v. Scarborough*, 20 So. (2d) 126, and *Mechlow v. Vocelle*, 22 So. (2d) 631, are directly in point but I do say that they are persuasive of the view that under the situation presented here the issuance of a municipal license is not a condition precedent to the renewal or transfer of a state and county license.

In view of the foregoing facts, I cannot answer the questions specifically; however, it is my advice that where the statutes governing the renewal and transfer of state and county beverage licenses have been complied with, respecting such licenses and places of business in Coral Gables, such renewals and transfers should be effected unless and until a court of competent jurisdiction holds to the contrary.

October 31, 1947.—047-369.

**LIQUOR LICENSE—TRANSFER OF LICENSE—EXCESS LICENSES**

**QUESTION:** Can a license issued to a place of business in X municipality be transferred out of that municipality to a place of business located in Y municipality or to a place of business in the territory of the county lying outside of X municipality, if the result of such transfer will be to increase the number of licenses in such territory of the county or in Y municipality in excess of the maximum number of licenses permitted under section 561.20(4), Florida Statutes, 1941, as amended by chapter 23746, acts of 1947?

*To Honorable Jess Mathas, Clerk, Circuit Court, DeLand, Florida:*

The transfer of licenses is governed by section 561.32, Florida Statutes, 1941, as amended by chapter 23746, acts of 1947, and the word "transfer" as used in such section refers to the transfer of a license by the person owning a place of business to the purchaser of such business when the licensee shall have made a bona fide sale of the business. Consequently, the transfer of a license as contemplated by the beverage law would not involve any increase in the number of licenses. The moving by a licensee to a new location is provided in section 561.33 of such statutes, and for the purpose of this opinion it is assumed that reference is made to such a move.

It seems to me that no extensive discussion of the question is necessary. Suffice it to say, that when one considers the last mentioned section in the light of the provisions of section 561.20(4), *supra*, placing a limitation on the number of licenses to be issued, the question, as modified by the preceding paragraph, must be, and is, hereby answered in the negative.

February 8, 1947.—047-42.

**BEVERAGE LICENSE—APPROVAL BY COMMISSION**

**QUESTION:** In view of the provisions of section 561.21, Florida Statutes, 1941, is it necessary that a Board of County Commissioners approve or disapprove an application for a beverage license under subsection 1, section 561.34 of said statutes?

*To Honorable Ernest Rutledge, County Judge, Hamilton County, Jasper, Florida:*

Subsection 1 of section 561.34 (originally sub-section I of section 5 of chapter 16774, acts of 1935), relates to a license tax to be paid for what is commonly referred to as a "beer license," which is issued only in counties where the sale of intoxicating liquors, wine and beers is prohibited.

The procedural steps involved in the application for a beverage license, insofar as are concerned here, are found in section 561.17, which provides that the application be filed with the county tax collector; section 561.18, which provides that the tax collector file the application with the Board of County Commissioners and that such board shall investigate the qualifications of the applicant, approve or disapprove the application and endorse its approval or disapproval on the application and forward the same to the director of the State Beverage Department; section 561.19, which requires nothing to be done by the Board of County Commissioners but merely provides for the action to be taken respecting the application if the finding of the Board of County Commissioners shall have been favorable to the applicant and said director shall approve such finding; and section 561.21, which reads:

"Applicants for licenses under subsections (1) . . . of section 561.34 shall not be required to comply with the requirements of section 561.19 as to the county commissioners and the director."

Sections 561.17, 561.18, 561.19 and 561.21, were all enacted originally as the second paragraph of section 2 of chapter 16774, *supra*, and as so enacted that part of said paragraph which is now section 561.21 read:

"Provided, that applicants for licenses under Sub-section I . . . of Section 5 hereof (now Subsection 1 of Section 561.34) shall not be required to comply with requirements of this paragraph as to the county commissioners and the Director."

It is evident, then, that when the Legislature passed chapter 16774, it was intended that applicants for beer licenses should not be required to meet any of the requirements as to county commissioners in "this paragraph" (paragraph 2 of section 2, *supra*), which paragraph included the present provisions of both section 561.18 and section 561.19.

As has been shown, there are no requirements as to county commissioners under section 561.19, such requirements being contained in section 561.18. Section 561.21 does not make sense by referring only to section 561.19 and excluding reference to section 561.18, but when section 561.21 is considered as exempting applicants for beer licenses from complying with the provisions of sections 561.18 and 561.19 as to county commissioners the clear purpose of the Legislature is manifest.

In the foregoing circumstances it is my opinion that section 561.21 must be read as referring to both sections 561.18 and 561.19, an opinion which is supported by *In re Advisory Opinion to the Governor*, 15 So. (2d) 291. It follows, therefore, that the question must be answered in the negative.

July 2, 1947.—047-175.

#### EFFECT OF LAW—UNOCCUPIED LOT—CHURCH

QUESTION: Is chapter 23835, acts of 1947, a valid legislative enactment?

*To Honorable James T. Vocelle, Director, State Beverage Department:*

This office has consistently pursued the policy of trying not to pass upon the constitutionality of legislative acts after the same has become law. It is my duty to defend the constitutionality of a law passed by the Legislature in valid form if the same is possible. I have carefully examined and studied chapter 23835 and its provisions, and noted the manner in which it was passed through the Legislature as a general rather than a special act. I shall express the belief, and not the opinion, that it will not stand a constitutional test. As to whether a license is granted on this law upon and after this official statement from me is a matter to be determined by the director of the State Beverage Department. If it is desired that the act be passed upon by the court to determine its constitutionality, I can and will promptly prepare appropriate proceedings to this end upon request. It is within the official prerogative of the director of said department to postpone acting upon the application for beverage license until a court opinion can be obtained.

The other inquiries are not to be answered, in my opinion, until it has been determined whether or not this matter will be pursued in appropriate court proceedings for judicial opinion. I will say, however, that I do not think an unoccupied lot where a church is contemplated to be built is the same as an established church, and for that reason, under the law existing prior to the passage of the 1947 act, there would be no inhibition to licensing beverage vendors within twenty-five hundred feet of an open lot not used by a church, even if erection of a church upon such lot were contemplated.

In making this last statement I do not mean to say that the licensee would be entitled to be continued or discontinued if, and when, a church



should be built within any prohibited distance of its operations. Such a question is not involved in the inquiry nor attempted to be answered in this opinion.

July 9, 1947.—047-207.

#### TRANSFER OF CERTIFICATES—MOVING LOCATION

**QUESTION:** Does the Board of County Commissioners of Hendry County, Florida, have authority to approve an application for the transfer of a license to sell alcoholic beverages from a place outside of an incorporated city to a place inside an incorporated city in the same county, and is it legal for such transfer to be made?

*To Honorable H. A. Rider, County Attorney, LaBelle, Florida:*

Section 561.33, Florida Statutes, 1941, reads as follows:

"Any licensee may move his place of business and sell at his new place of business upon surrendering his license to the tax collector and making application for a new license describing the new location of his business. Upon the surrender of such license with the application for a new license in a different location there shall be issued to such licensee, without the payment of any further fee or tax, such new license for the new place of business; provided, however, that if the new place of business be in a different county from the county where the original license was issued an additional county license tax shall be paid by the licensee before the issuance of the new license; and provided further, that if the new place of business be in another city or town within the same county in which the original license was issued the licensee shall be required to pay an additional license to the city or town in which the new place of business is located."

I assume that the incorporated city has no ordinance prohibiting the transfer or assignment of the license.

I further assume that no license has heretofore been revoked for the sale of alcoholic beverages in the contemplated place inside the incorporated city as to bring it within the provisions of section 561.58, Florida Statutes, 1941, and if a business selling intoxicating liquors is established on the place contemplated in the incorporated city that no state statute or ordinance of the said incorporated city will be violated.

If my assumptions are correct and if the said licensee desiring to move to the new location within the incorporated city complies strictly with said section 561.33, Florida Statutes, 1941, it will not be necessary for the county commissioners to approve the application of transfer and it will be legal for the transfer to be made.

August 1, 1947.—047-237.

#### SUNDAY LAWS—SALE OF BEER—LEGALITY

**QUESTIONS:** 1. Does chapter 855, Florida Statutes, 1941, preclude a Board of County Commissioners from legalizing the sale of alcoholic beverages on Sunday within the territory of a county not included within any municipality?

2. If the answer to question No. 1 is in the affirmative, can such a board establish zones in such territory, so that said beverages can be sold on Sunday in some county commissioners' districts, or parts thereof, and prohibited in other of said districts, or parts thereof?

*To Honorable H. A. Rider, County Attorney, LaBelle, Florida:*

(1) Said chapter 855 covers "Sunday Laws" and makes unlawful certain pursuits, businesses or trade on Sunday. The various provisions

of said chapter have not been altered or amended in any way affecting the question since the legislative session of 1941. In 1947 the Legislature enacted chapter 23746 amending section 562.14, Florida Statutes, 1941, to include paragraph (4), providing that boards of county commissioners may, by resolution, independently regulate the hours of sale of alcoholic beverages within the territory of a county not included within any municipality notwithstanding the other provisions of such section. The other provisions of such section pertinent here are the inhibitions of paragraph (1) against the sale of alcoholic beverages between "the hours of midnight and 7:00 o'clock a.m. of the following day" and paragraph (2) against the sale of intoxicating beverages "between twelve o'clock midnight Saturday and 7:00 o'clock a.m. Monday." It is my judgment that under said laws such a board may, by resolution, regulate only the hours of sale of alcoholic beverages in said territory, but is not empowered to regulate the days upon which sales may be made; hence, it is my opinion that such a board cannot permit the sale of such beverages on Sunday.

(2) Inasmuch as question No. 1 is not answered in the affirmative, there is no occasion for answering the second question.

July 23, 1947.—047-218.

#### HOURS OF CLOSING—COUNTY RESOLUTION

QUESTION: Is the resolution hereinafter described valid?

*To Honorable James T. Vocelle, Director, State Beverage Department:*

The Board of County Commissioners of St. Johns County, by resolution, authorized "hotel and clubs, incorporated not for profit, in that part of St. Johns County, Florida, not included in any municipality, to sell alcoholic beverages at all hours of every day except the hours between 2 a.m. and 7 a.m. the following day."

Paragraph (4) of section 562.14, Florida Statutes, 1941, as amended by chapter 23746, acts of 1947, gives to boards of county commissioners the power independently to regulate by resolution the hours of sale of alcoholic beverages within the territory of the county not included within any municipality, notwithstanding the other provisions of said section.

By the same section (paragraph (1)), no alcoholic beverages may be sold between midnight and 7 a.m. the following day and (paragraph (2)), no intoxicating beverages may be sold between midnight Saturday and 7 a.m. Monday.

The first thing to dispose of is that the resolution applies only to hotels and clubs, incorporated not for profit, thus raising a question as to whether such limitation results in an arbitrary classification. In a sense, all legislation is classification and should be upheld "unless the classification is palpably arbitrary, without possible basis for the distinction made by the lawmaking power." (See *Ex Parte Lewinsky*, 66 Fla. 324, 63 So. 577.) I cannot say that the classification of such resolution is arbitrary per se or that it is palpably arbitrary. It may be that there are factual situations under which the classification is arbitrary; however, I am unable to anticipate such situations here and would have to have the pertinent facts in hand before undertaking an opinion thereon.

Another feature of the resolution to be observed is the proviso "except the hours between 2 a.m. and 7 a.m. the following day." The effect of the resolution, as worded, is that alcoholic beverages may be sold at all hours every day except that such beverages cannot be sold between 2 a.m. on every day and 7 a.m. the following day. The prohibited period is twenty-nine hours (more than one day) and overlaps the 2 a.m. on the "following" day; therefore, the actual wording of the proviso is to preclude such sale at all hours. This, of course, would negate the obvious purpose of the resolution and make of it an absurdity. It seems clear that the board really intended that the excepted hours should be between 2 a.m. and 7 a.m. the

"same" day. By the use of the last quoted word the resolution is given sense and meaning, and the resolution should be so construed.

It is my recommendation that the resolution be treated as valid in the particulars mentioned unless and until a court of competent jurisdiction holds otherwise.

October 22, 1947.—047-356.

#### BEER LICENSE—SALES AFTER MIDNIGHT— REGULATION OF SALES

**QUESTION:** Can a person holding a "beer" license lawfully sell beer containing not more than 3.2% of alcohol by weight between the hours of 12 o'clock midnight and 7 o'clock a.m. of the next day, when no resolution has been adopted by the Board of County Commissioners permitting such sale?

*To Honorable D. R. Partin, County Judge, Perry, Florida:*

Paragraphs (1) and (1A) of section 561.34, as amended by chapter 23746, acts of 1947, cover the license fees to be paid by vendors of beverages containing alcohol of more than 1% and not more than 3.2% by weight, and vendors of beverages containing alcohol of more than 1% and not more than 3.2% by weight for consumption off the premises, respectively. Said licenses are commonly referred to as "beer" licenses and while the beverages therein described are "alcoholic beverages," they are not "intoxicating beverages" as those terms are defined in the beverage law. See section 561.01, Florida Statutes, 1941. It is assumed that reference is made to the beverages licensed under said paragraphs (1) and (1A) of section 561.34, as amended, and by reference to the Board of County Commissioners, it is assumed also that the territory involved is not included within any incorporated city or town.

Based upon the foregoing, the pertinent provisions of the law are found in paragraphs (1) and (4) of section 562.14, as amended by chapter 23746, which paragraphs read as follows:

"(1) No alcoholic beverages may be sold, consumed or served or permitted to be served or consumed, in any place holding a license under the State Beverage Department of Florida, between the hours of midnight and 7:00 o'clock a.m. of the following day.

"(4) The board of county commissioners of any county of the State of Florida may, by resolution, independently regulate the hours of sale of alcoholic beverages within the territory of such county not included within any municipality notwithstanding the provisions of this section."

It appears from said paragraphs that the authority of the board is permissive and in the event the board has not by resolution, regulated the hours of sale of alcoholic beverages within the territory of the county not included in any incorporated municipality, the person holding a license to sell alcoholic beverages pursuant to the aforesaid paragraphs (1) and (1A) of section 561.34, cannot sell lawfully said beverages between the hours of 12 o'clock midnight and 7 o'clock a.m. of the day following.

November 13, 1947.—047-378.

#### MUNICIPAL LIQUOR CURFEW—ENFORCEMENT BY SHERIFF

**QUESTION:** Does the sheriff, and his deputies, have the power or authority to arrest vendors of alcoholic beverages who keep their places of business open after the hours set by the ordinance of the municipality in which said business is located?

*To Honorable James T. Voelle, Director, State Beverage Department:*

Section 562.14, Florida Statutes, 1941, as amended by chapters 21944, 22605, 23746, acts of 1943, 1945 and 1947, reads as follows:

(1) No alcoholic beverages may be sold, consumed or served or permitted to be served or consumed, in any place holding a license under the State Beverage Department of Florida, between the hours of midnight and 7:00 o'clock a.m. of the following day.

(2) No intoxicating beverages may be sold, consumed or served or permitted to be served or consumed, in any place holding a license under the State Beverage Department of Florida, between twelve o'clock midnight Saturday and 7:00 o'clock a.m. Monday.

(3) Incorporated cities or towns may by ordinance independently regulate the hours of sale of alcoholic beverages within the corporate limits thereof, notwithstanding the provisions of this section.

(4) The board of county commissioners of any county of the State of Florida may, by resolution, independently regulate the hours of sale of alcoholic beverages within the territory of such county, not included within any municipality notwithstanding the provisions of this section.

(5) Any person, firm, or in case of a corporation, the officers, agents or employees thereof, violating any of the provisions of this section shall be guilty of a misdemeanor and shall upon conviction be punished by imprisonment in the county jail for not more than six months or by fine of not more than five hundred dollars, either one or both, in the discretion of the court trying the offender.

It will be seen by said subsection 3 that the Legislature gives incorporated cities and towns the authority to regulate the hours of sale of alcoholic beverages within their corporate limits and by said subsection 4, the boards of county commissioners of any county are given the authority by resolution to regulate the hours of sale of alcoholic beverages in the territory of their counties, not included in any municipality; and by said subsection 5 provides that violation of any of the provisions of said section 562.14 (which of necessity would be an ordinance of a municipality regulating the hours of sale within its corporate limits, or a regulation of the Board of County Commissioners regulating the sale of alcoholic beverages in its county outside of a municipality), to be a misdemeanor and punishable by imprisonment in the county jail.

In my opinion, therefore, the Legislature, by this section, gives to the cities and towns the power to fix the hours of sale of alcoholic beverages within their territory and any violation thereof would be a misdemeanor and a crime against the state and punishable by imprisonment in the county jail. Such being a state offense, I hold that the question submitted to me should be answered in the affirmative.

I do not, by this opinion, intend to hold that a police officer of the city may not arrest a violator of this section and turn him over to the state authorities for prosecution, nor do I intend to prohibit any municipality from enacting an ordinance, if it has the power so to do, fixing the hours of sale of such alcoholic beverages within its territory and providing a punishment for violation thereof in its own courts.

March 4, 1947.—047-69.

#### BEER DISTRIBUTOR—AID TO VENDORS

QUESTION: Will the fulfillment of the offer contained in the circular hereinafter described constitute a violation of section 561.42, Florida Statutes, 1941, as amended?



*To Honorable James T. Vocelle, Director, State Beverage Department:*

The circular referred to in the question is from a licensed distributor and is addressed "To All Beer Vendors," the pertinent part thereof being worded:

"We offer for Immediate Purchase;  
A Special Beer Deal (For a limited time only):  
You get 6 Cases (New York Premium, Clover Club Beer,  
Brown Export Bottles).  
Pay for only 5 Cases.  
Your profit is \$12.55 on Investment of \$16.25.  
(10 deal limit to each customer).  
Remember—Today It's Profit That Counts."

The applicable provisions of section 561.42, *supra*, read:

"... nor shall such licenses . . . distributor assist any vendor by any gift or loan of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such licensed . . . distributor; . . ."

It seems to me that the quoted portion of section 561.42 is couched in plain and understandable language and that so long as said section remains the law of this state, the fulfillment of the quoted offer will be in violation of said section; hence, it is my opinion that the question should be answered in the affirmative.

March 21, 1947.—047-79.

#### FREE ENTERTAINMENT—ADDITIONAL LICENSE

**QUESTION:** Where a vendor of liquors and beverages, licensed under chapter 561, Florida Statutes, 1941, provides free moving pictures in his bar or place of business, is he required to obtain a license under section 206.37, Florida Statutes, 1941, in addition to his liquor and beverage license?

*To Honorable C. M. Gay, State Comptroller:*

The vendor in question provides moving pictures without charge to all persons in his bar when they are being shown, evidently without regard to their purchases of goods sold by him under his liquor and beverage license. Section 205.37, Florida Statutes, 1941, provides that "every person who operates for profit any place where dancing is permitted or entertainment, such as variety programs or exhibitions, is provided for a charge shall pay a license tax of one hundred dollars."

"The intent and meaning of the quoted statute are that every person who operates for profit any place where dancing is permitted (with stated exceptions) shall pay an additional license tax of \$100.00, or every person who operates for profit any place where entertainment, such as variety programs or exhibitions, is provided for a charge (with stated exceptions) shall pay an additional license tax of \$100.00." (*Mouchas v. Stoutamire*, 148 Fla. 373, 4 So. (2d) 459, text 460.) The words "for a charge" follow the provision "or entertainment such as variety programs or exhibitions is provided" and relate to it and not to the dancing previously mentioned in the statute. (*Mouchas v. Stoutamire*, *supra*.) The statute in question was amended in 1941, subsequent to the case of *Levy v. Collins*, 143 Fla. 619, 197 So. 522, by adding the quoted words "for a charge."

From the file in this case there appears to be no charge for seeing the moving pictures in question; any person present may see same without the payment of any sum. I find nothing requiring that he purchase

any goods to be entitled to see the pictures, the only thing necessary is that he be present. There appears to be no dancing in connection with the showing of the pictures.

Under the circumstances, I am of the opinion that the question should be answered in the negative.

October 22, 1947.—047-368.

#### EXCISE TAX ON BEER—BEER DELIVERED TO BOAT

**QUESTION:** Under the provisions of section 561.49, Florida Statutes, 1941, is X exempt from paying the state excise tax on alcoholic beverages in the circumstances hereinafter described?

*To Honorable James T. Vocelle, Director, State Beverage Department:*

X is a company having its place of business in the State of Florida and is licensed as a manufacturer of malt liquors (beer) under our state beverage law. X proposes (first) to sell and deliver beer to ships in the harbors and ports located within the State of Florida, said beer to be subsequently exported to foreign countries by such ships, and (secondly) to sell and deliver beer to ships within said harbors and ports to be consumed by the crews of such ships. None of such ships holds any license under said law.

Section 561.49 provides that the aforesaid excise taxes must be paid as to all alcoholic beverages "sold within this state" and that the exemption of said section is limited to sales of such beverages "actually delivered by such manufacturer . . . to persons outside the State of Florida when such deliveries are actually made outside the State of Florida. . . ." By section 561.14 (1), manufacturers of beer are permitted to "distribute the same at wholesale to licensed distributors and licensed vendors and to no one else within this state" and by paragraph (2) of said section, distributors of beer are permitted to sell and distribute said beverage "at wholesale to other licensed distributors, to licensed vendors, to licensed operators of . . . steamships . . . and to no one else within this state." Section 561.34 (10) is the only section of the beverage law providing for the licensing of ships and the license issued to the operators of the steamships described therein permits sales to be made "only to passengers upon such steamships . . . and may be served only for consumption thereon" and while said steamships "are in transit and shall not be permitted while such steamships are moored at docks or wharfs in ports of this State."

Based upon the foregoing, it seems to me that the question must be, and it is, answered in the negative as to both of the aforesaid proposals.

July 25, 1947.—047-216.

#### NUMBER OF LICENSES ISSUED BY COCOA

**QUESTIONS:** 1. Under house bill No. 1187, enacted at the 1947 session of the Florida Legislature, is the director of the State Beverage Department authorized at the end of the present licensed year to approve the renewal of more than five licenses in the city of Cocoa?

2. Under the aforesaid bill, can transfers of the existing beverage licenses in said city be made to the purchasers of the businesses covered by such licenses?

*To Honorable James T. Vocelle, Director, State Beverage Department:*

The request for opinion states that when said act is considered with the state census for 1945 (Seventh Census of the State of Florida), the City of Cocoa is entitled to five licenses of the type described therein while twenty-three such licenses are outstanding at the present time. Reference is made to certain exceptions contained in section 3 of the act, but in the

light of what will be said hereinafter these exceptions need not be discussed in disposing of the questions.

It will be noted that the limitation is upon the number of licenses which may be "granted by" such city. Apparently, the limitation relates to municipal licenses and in that particular is a matter between the City of Cocoa and the holder of outstanding licenses; that such limitation does not operate to restrain the renewal or transfer of existing state and county licenses. I do not state that *Singer v. Scarborough*, 20 So. (2d) 126, and *Mechlow v. Vocelle*, 22 So. (2d) 631, are directly in point but I do say that they are persuasive of the view that under the situation presented here the issuance of a municipal license is not a condition precedent to the renewal or transfer of a state and county license.

Based upon the foregoing, I recommend that where the statutes which govern the renewal and transfer of state and county beverage licenses have been complied with respecting such licenses and places of business in Cocoa, such renewals and transfers should be effected—unless and until a court of competent jurisdiction holds to the contrary.

### LOCAL OPTION ELECTIONS

January 28, 1947.—047-15.

#### REGISTRATION OF VOTERS—PERIOD COVERED

**QUESTION:** Under the applicable general laws, may the registration books of a county be opened for the registration of electors to vote in a local option election as contemplated by chapter 567, Florida Statutes, 1941, other than during those periods when electors may register and thereby qualify to vote in general elections?

*To Honorable W. W. Whitehurst, County Attorney, Wauchula, Florida:*

The request for opinion mentions and disposes of the effect of chapter 22874, Laws of Florida, acts of 1945, as affecting this matter; hence, this discussion is limited to the applicable general registration laws, as indicated in the question.

Section 567.02, Florida Statutes, 1941, provides that for such a local option election, "electors may be registered as provided in the general law for registration for special elections and they shall have the same qualifications for and prerequisites to voting as in elections under the general election laws." Section 98.08, Florida Statutes, 1941, requires that special elections shall be held in the instances therein enumerated, but neither the provisions of that section nor those of any other section of Florida Statutes contemplate the opening of the registration books solely for registration of electors for special elections. It is not considered that an election of the character provided by chapter 103, Florida Statutes, 1941, which provides for registration of voters up to five days prior to the election, is such a "special election" as is contemplated by such quoted words in said section 567.02. Under the general laws, registration books may be kept open only during those periods fixed in the applicable statutes.

In view of the foregoing, in my opinion the question is properly answered as follows:

Under the general registration laws of Florida, the registration of electors qualified to participate in general elections is confined to particular periods provided in the statutes; hence, the registration of electors who desire to participate in a local option election at any time other than during those periods when such books are so authorized to be open, is not permitted by law.

May 1, 1947.—047-122.

#### OPENING OF BOOKS—REGISTRATION

**QUESTION:** Under the general registration laws, may the registration books of a county be opened for the registration of electors to vote in a local option election, as contemplated by chapter 567, Florida Statutes, 1941, other than during those periods when electors may register to vote in general elections?

*To Honorable D. R. Partin, County Judge, Perry, Florida:*

It is assumed that in Taylor county, the time for the opening and closing of registration books is controlled by the provisions of the general registration laws; and this opinion is conditioned upon such assumption.

While section 567.02, Florida Statutes, 1941, provides that for such a local option election, "electors may be registered as provided in the general law for special elections," there appears to be no provision in our statutes for the opening of registration books for special elections. Under the general laws, the general registration books are open only during the period provided in the applicable statutes for the registration of electors.

In view of the foregoing, it would appear that the registration books may not be opened to permit persons to register to participate in a local option election to be held on next June 3.

February 4, 1948.—048-38.

#### REGISTRATION—PARTICIPATION IN LOCAL OPTION ELECTION

**QUESTION:** Will those persons in Lake county who register for the primary election during the time the primary books are open for registration this year and prior to March 4, 1948, be qualified to vote in the local option election to be held in said county on such date?

*To Honorable J. W. Hunter, Attorney, Board of County Commissioners, Lake County, Tavares, Florida:*

Section 567.02, Florida Statutes, 1941, provides that for such election, electors may be registered as provided in the general law for registration for special elections, and that they shall have the same qualifications for, and prerequisites to, voting as in elections held under the general election laws. Heretofore I have held, in effect, (opinion No. 047-15, of January 28, 1947), that since there appeared to be no provision in the general registration laws for a special registration for a special election, as contemplated by section 569.02, there could be no special registration for a local option election.

Chapter 22549, Laws of Florida, acts of 1945, provided for a re-registration of voters in Lake county to qualify to vote in "any election, General or Special." The request for opinion recites that heretofore the circuit court of that county held section 3 of the chapter invalid. There appears to be nothing in the remainder of the act which precludes the application of the provisions of section 102.10, Florida Statutes, 1941, to said county; and it further appears that said section is in force as to all election precincts in the county. This section provides, in part, that persons duly registered in the primary registration books are also duly registered for "all general primary elections and all general and special elections" so long as they continue to reside in the precinct where registered. In my opinion No. 046-355, Biennial Report of Attorney General, 1945-1946, pages 191, 192, I held that persons registered in the primary registration books (in precincts where section 102.10 is in force), were eligible to vote in the general election and that the supervisor should transfer their names to the general election registration books. (And on this point, see *State ex rel. Gandy v. Page*, Judge, et. al. (Fla.), 170 So. 118, 119, dealing with similar provisions of section 102.12, Florida Statutes, 1941.)



It appears that the general registration laws of Florida relative to the opening and closing of the registration books control in Lake county (as to primary books, sections 102.09, 102.17, Florida Statutes, 1941; as to general election books, section 98.22, Florida Statutes, 1941, as amended). The latter section provides that the general election registration books shall close the thirtieth day preceding the day of the general election. I see nothing in the provisions of said section 567.02 which could reasonably support a construction that only those electors who registered not later than the thirtieth day prior to the local option election could participate therein.

In view of the foregoing, in my opinion the question is answered as follows:

It is recognized that the primary registration books of Lake county are now open for registration. Those persons who are now registered in said books and whose names have not heretofore been transferred to the general election registration book, and those persons who may register in said primary registration books at any time prior to March 4, 1948, under such registrations are, or will be, duly registered to participate in such election subject to the following exception. Persons registered in pursuance of section 102.17, Florida Statutes, 1941, who are not 21 years old on or before, or have not lived for the required periods in the state or county by, March 4, 1948, may not participate in such election. The supervisor of registration is authorized to transfer the names of such persons other than those excepted to the general election registration books for the use of such records at said local option election.

June 24, 1948.—048-210.

#### SIGNATURES—IDENTIFYING REGISTERED VOTERS

**QUESTION:** When a written application for a local option election in a certain county is presented to the Board of County Commissioners of said county, as contemplated by section 567.01 (1), Florida Statutes, 1941, as amended, if said board determines that certain of those who signed such application by initials and surname are the same persons registered by Christian and surname on the registration books, should such signatures be accorded consideration in ascertaining if one-fourth the qualified electors of the county have signed the application?

*To Honorable A. C. McAulay and Honorable Sol McClelland, County Commissioners, Highlands County, Sebring, Florida:*

Section 567.01 (1) requires such written application to be "signed by one-fourth of the registered voters of the county" and that, "The signature of each registered voter shall be personally signed to such application."

If the Board of County Commissioners determines that a person who signed said petition by initials and surname is the identical person registered by Christian and surname on the registration books (for example, "J. F. Smith" and "John F. Smith"), the name of such person should be accorded the same weight as a signer of such application as though his Christian name appeared in such signature.

Hence, the foregoing question is answered in the affirmative.

June 30, 1948.—048-226.

#### SIGNATURE OF APPLICANT—REMOVAL FROM APPLICATION

**QUESTION:** Where application for local option election has been filed at a regular or special meeting of the county commissioners requesting an election under the provisions of section 567.01, Florida Statutes,

1941, and such application has been "filed" by the Board of Commissioners, may the ones whose signatures appear on such application withdraw their signatures therefrom?

*To Messrs. N. B. Jackson and A. C. McAulay, County Commissioners, Highlands County, Sebring, Florida:*

Local option elections are provided for by both constitutional provision and legislative enactment.

Article XIX, section 1, of the Florida Constitution provides in part:

"The board of county commissioners of each county in the state, not oftener than once in every two years, upon application of one-fourth of the registered voters of any county, shall call and provide for an election in the county in which application is made, to decide whether the sale of intoxicating liquors, wines or beers shall be prohibited therein. . . ."

Section 567.01, Florida Statutes, 1941, provides in part:

"(1) The board of county commissioners of each county shall order an election to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited in said county and if not prohibited, to decide the method of sale, upon the presentation to said board at a regular or special meeting, of a written application asking for such a determination in the county in which said application is made signed by one-fourth of the registered voters of the county."

In determining whether or not the signers of such application or petition may, after the same has been presented to the county commissioners at a regular or special meeting, withdraw their names from such petition, several factors must be taken into account: (1) the precise wording of the constitutional provision and legislative enactment providing for such election and the calling thereof; (2) the effect the withdrawal of such names would have upon the petition, that is, whether it would leave the petition with sufficient number of signers or bring it below the requirement, and (3) whether or not the signatures were obtained upon such petition through fraud, deceit or misrepresentation.

I am of the opinion that when such petition, signed by 25% of the registered voters of the county, is filed with the county commissioners at a regular or special meeting that the constitutional provision and legislative enactment aforementioned make it mandatory that such election be called. There is no provision for the withdrawal of names from such petition. When such petition is filed the voting public then acquires a vested right to have the election called and the question placed before the voters of the county to determine whether or not intoxicating beverages shall or shall not be sold within the county.

I am of the further opinion that if the signers were permitted to withdraw their names from the petition that then the remaining signers of such petition would be equally entitled to have new names added to it. This could very easily result in a continuous bickering back and forth between two factions in the county that could continue endlessly. It could quite possibly place within the power of a single individual signer, after such petition has been filed with the county commissioners, to either permit the holding of such an election or to defeat the holding of such an election.

I am, therefore, of the opinion that when such application containing the signatures of 25% of the registered voters of the county is presented to the county commissioners at a regular or special meeting, then the matter is closed; that no one then has the right to withdraw his name from such petition, nor does anyone have the right to add his name thereto, but that it is then mandatory that such election be held unless it can be shown that signatures were obtained thereon through fraud, deceit or misrepresentation.

sensation. This is particularly true where the withdrawal of names would bring the number of signers below the 25% of the registered voters as required by law.

I am not unmindful of the fact that the various courts are divided on the question involved, but the precise wording of the constitutional provision and statute herein referred to requires that I answer the question in the negative. (See annotation in 126 A.L.R. 1031; 29 C. J. S. 93.)

January 8, 1948.—048-8.

#### ELECTION PETITION—REGISTRATION LIST— QUALIFIED ELECTORS

**QUESTION:** In view of the provisions of chapter 24019, Laws of Florida, acts of 1947, providing for a reregistration of electors in counties affected thereby and applicable only in Okaloosa county, in the event an application for a local option election were presented to the Board of County Commissioners of said county, which registration books could be legally used to determine if such application were signed by the sufficient number of registered voters as required by section 567.01, Florida Statutes, 1941, as amended; and, in event of such an election, to evidence the electors qualified to participate in such an election?

*To Honorable Leron W. Rice, Clerk of Circuit Court, Okaloosa County, Crestview, Florida:*

A local option election is ordered by the Board of County Commissioners when application therefor signed by one-fourth the registered voters of the county is presented to them, all in the manner and as prescribed by section 567.01, Florida Statutes, 1941, as amended.

Chapter 24019, Laws of Florida, acts of 1947, is a population act now and hereafter applies only to Okaloosa county. Section 1 thereof provides for a registration for all voters "who intend to vote and qualify for voting in any general or primary election to be held in the year 1948 A. D." Section 4 of the act provides that the "registration or reregistration of voters as provided for herein shall constitute the qualified registration of voters for elections held after January 1, 1948,"; however the aforesaid specific wording of section 1 of the act and the title of the act appear to limit the registration to such named elections in the year 1948.

If I assume chapter 24019 to be valid legislation, the effects of the act reasonably appear as follows:

(1) Subsequent to December 31, 1947, the only legal registration books in such county would be those contemplated by said act.

(2) While the act refers only to "primary and general election," the assumption of validity would require a construction to include a "special election," such as a local option election within its coverage.

(3) The registration books contemplated by the act would apply only to 1948, with no provision for registration in subsequent elections except by general law.

(4) Section 567.01, as amended, reasonably contemplates a comprehensive or representative existing registration of electors in the county qualified to participate in general elections, so that it may be determined whether or not the application for the local option election is signed by a sufficient number of registered voters. However, the assumption of validity of said act carries with it the arguable position that a petition properly presented to the county commissioners at any time subsequent to January 1, 1948, signed by one-fourth the registered voters qualified to participate in the 1948 general election as evidenced by books under the new registration would be sufficient, even though there had been no comprehensive or representative registration qualifying registrants to participate in the 1948 general election.

Assuming the act to be valid, as aforesaid, the difficulties presented in relation to a local option election are manifest. On December 17, 1947, in an opinion to the supervisor of registration of said county, it was held, in effect, that while grave doubt existed that chapter 24019 could withstand a court test of its validity, it was not the province of this office to attempt to decide that question under the circumstances there found. Indeed, it is obvious that only the courts can, with finality, adjudicate the validity of laws.

In view of the legal problems and uncertainties mentioned in or reflected by, the foregoing, it is my judgment that if the Board of County Commissioners of Okaloosa county is presented with application for a local option election, as contemplated by section 567.01, as amended, before the board could, with any degree of certainty, rule upon the adequacy of such application, it would be required, in appropriate court proceedings, to have judicially determined what registration laws are applicable in said county, and what registration books are the valid books of said county.

The foregoing conclusion renders unnecessary more specific answer to the question.

May 29, 1947.—047-142.

#### FORM OF BALLOT—TWO QUESTIONS

QUESTION: On April 19, 1947, in pursuance of petition filed under section 567.01, Florida Statutes, 1941, the Board of County Commissioners of a county in Florida called a local option election, as contemplated by said chapter, to decide whether the sale of intoxicating liquors, wines or beers should be prohibited therein, said election to be held on June 3, 1947, due notice of such election being given. Should the form of ballot to be used at said election conform to the requirements of section 567.07, Florida Statutes, 1941, as such section existed at the time of filing of petition, or conform to the requirements of said section as amended on May 24, 1947, by chapter 23747, Laws of Florida, 1947.

*To Honorable F. A. Parker, Clerk of Circuit Court, Taylor County, Perry, Florida:*

At the time the petition was filed, section 567.01, Florida Statutes, 1941, contemplated an election on the single question of "for selling" or "against selling" such liquors, wines or beers; and the notice required by such section and form of ballot prescribed by section 567.06, Florida Statutes, 1941, were concerned only with that single question.

Chapter 23747 amended sections 567.01, 567.06, 567.07 and 567.12. The effect of such amendments was to provide for determination of two questions; (a) whether sale of such liquors, wines or beers should be prohibited; and (b) if sales were permitted, whether such sales should be by the package and drink or by package only. Section 567.06, as amended, provides the form of the ballot to be used at such an election, which sets forth such two questions to be decided. Chapter 23747 repealed all laws and parts of laws in conflict therewith, and became effective immediately upon its enactment.

It would, therefore, appear that the form of ballot to be used in the election mentioned in the question must be that form set forth in, and required by, said section 567.06, as amended by chapter 23747, Laws of Florida, 1947.

March 30, 1948.—048-107.

#### AD VALOREM TAXES—ALCOHOLIC BEVERAGES

QUESTION: Are the stocks of alcoholic beverages in a county between the first day of January and the first day of March, 1947, subject



to ad valorem taxes for the full year where the county was voted dry on June 17, 1947?

*To Honorable Wilbur W. Whitehurst, County Attorney, Wauchula, Florida:*

Under date of April 18, 1947, this office rendered an opinion upon the identical question, designated as 046-163.

Although the Legislature of the State of Florida has provided for a refund of unused portion of license taxes, namely sections 567.08, 567.09 and 567.10, Florida Statutes, 1941, the Legislature has not provided for a refund of ad valorem taxes under such circumstances and until it does so provide I know of no authority for such refund.

## INTOXICATING LIQUORS IN COUNTIES WHERE PROHIBITED

August 16, 1947.—047-259.

### SECOND OFFENSE—FELONY DEFINITION— PERIOD OF COMMITTING CRIME

QUESTION: Is a second offense against the provisions of chapter 568, Florida Statutes, 1941, pertaining to intoxicating liquors in dry counties, a felony under the provisions of section 562.45, Florida Statutes, 1941.

*To Honorable Howard G. Livingston, County Judge, Sebring, Florida:*

Up until 1943, section 568.05, Florida Statutes, 1941, prescribed the penalty for all violations of chapter 568, pertaining to intoxicating liquors in dry counties, regardless of how many times the offender had previously violated the provisions of said chapter; and section 562.45, penalizing violations of "the beverage law," had no application to violations of chapter 568 because section 561.01 provided that "the beverage law" should consist of chapters 561 and 562.

However, in 1943, section 561.01 was amended by chapter 21839, so as to make chapter 568 a part of "the beverage law."

Inasmuch as section 562.45 prescribes the penalties for violations of "the beverage law," and inasmuch as chapter 568 has been a part of "the beverage law" since the aforementioned 1943 amendment to section 561.01, it is my opinion that second offenders against the provisions of chapter 568 are subject to prosecution for felony under the second-offender clause of section 562.45. (The incorporation of chapter 568 into the beverage law made no difference as to the penalty for first offenders against the provisions of said chapter, because the penalty for such first offender would be a fine of not more than \$500 or imprisonment in the county jail for not more than six months, under section 562.45 as well as under section 568.05).

However, in my opinion, a person cannot be prosecuted for felony under section 562.45 for a second violation of chapter 568 unless both violations occurred after chapter 568 was made a part of "the beverage law" by the 1943 amendment to section 561.01. This is so because the provisions of section 562.45 which make a second-offender a felon requires that the first, as well as the second, violation be a violation of "the beverage law," and chapter 568 was not a part of "the beverage law" until the aforementioned amendment to section 561.01 in 1943.

I suggest that, in charging a person as a second offender under section 562.45, it should be alleged that the second offense was committed after the conviction for the first offense, because I think that the construction placed upon sections 775.09 and 775.10, (providing for enhanced penalties for second and fourth convictions of felonies), in *Joyner v. State*, 30 So. (2d) 304, is equally applicable to section 562.45.

## DISPENSING AND CONSUMING OF LIQUOR AND BEVERAGES

July 21, 1948.—048-237.

WINE AND BEER—SALE BY DRINK—  
CURB OR DRIVE-IN SERVICE

QUESTIONS: 1. Does section 569.01, Florida Statutes, 1941, or any other pertinent section, permit a municipality to prohibit curb or drive-in service of wine and/or beer by the drink containing more than 3.2 per cent alcohol by weight?

2. Is a municipality authorized under a general welfare clause in its charter to refuse issuance of a wine and beer license because of the location of the proposed business, even though a state and county license is issued involving, apparently, only checking the personal qualifications of the licensee?

*To City Attorney of Clearwater, Clearwater, Florida:*

Section 569.01, Florida Statutes, 1941, makes it unlawful for any person to sell or serve by the drink any intoxicating liquor other than malt beverages of legal alcoholic content, except within the building which is the address of the person holding a license for the sale of such intoxicating liquor. The act further provides, "it is intended to forbid the practice of curb or drive-in service in connection with such intoxicating liquors when sold by the drink;"

Further attention is called to section 569.02, Florida Statutes, 1941, providing, "it is unlawful for any person to consume any intoxicating liquor, except malt beverages of legal alcoholic content, at curb or drive-in stands, except within the building which is the address of the person holding a license for the sale of such intoxicating liquors."

Section 561.01 (8), Florida Statutes, 1941, describes "intoxicating beverage" and "intoxicating liquor" as including "only those liquors, wines and beers containing more than 3.2 per cent of alcohol by weight."

The State Beverage Department of the State of Florida has imposed upon it the duty of enforcing the laws, together with the other beverage laws of the State of Florida. It is clearly made unlawful for any person to sell or serve or consume at curb or drive-in stands, except within the building which is the address of the person holding the license, any intoxicating liquors other than malt beverages of not more than 3.2 per cent alcohol by weight. The acts being made illegal under chapter 569.01, Florida Statutes, 1941, and enforceable by the beverage department, a municipality under its general police power may enact an ordinance making such acts unlawful within the corporate limits and enforceable by its police department.

Question No. 1 is therefore answered as follows:

While section 569.01, Florida Statutes, 1941, does not authorize, in so many words, a municipality to prohibit curb or drive-in service of wine and beer by the drink of more than 3.2 per cent alcoholic content by weight, yet it makes such act unlawful under the state laws. It being so made unlawful under the state laws, the municipality may under its police powers make it unlawful under a municipal ordinance. Attention is called to the fact, however, that this prohibition is only as to alcoholic liquors containing more than 3.2 per cent alcohol by weight.

In answering question No. 2, attention is directed to section 561.44 (1), Florida Statutes, 1941, providing:

"Incorporated cities and towns are hereby given the power hereafter to establish zoning ordinances restricting the location wherein a vendor licensed under §561.34 may be permitted to conduct his place of business and no license shall be granted to any

such licensee to conduct a place of business in a location where such place of business is prohibited from being operated by such municipal ordinance; provided, however, such power shall not apply to vendors licensed under paragraph (b) of subsection (1) of §561.34, Florida Statutes, 1941."

Section 561.34 (1) (b), Florida Statutes, 1941, provides "vendors of beverages containing alcohol of more than one per cent by weight and not more than 3.2 per cent by weight for consumption off the premises only, seven and one-half dollars."

This is a direct authorization to a municipality to zone the municipality into zones wherein the sale of all alcoholic beverages may or may not be sold, with one exception, and that is the sale of beverages containing more than one per cent but not more than 3.2 per cent of alcohol by weight for consumption off the premises.

Question No. 2 may be answered by stating that it is my opinion that a municipality may, under the provision of section 561.44 (1), Florida Statutes, 1941, designate certain areas wherein alcoholic beverages may not be sold excepting beverages containing not more than 3.2 per cent alcohol by weight for consumption off the premises), without reference or authority under the general welfare clause of its charter.

## CHAPTER XXIX

### AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

#### SOIL CONSERVATION

June 7, 1948.—048-188.

##### AUTHORITY OF BOARD—CHANGE DISTRICT BOUNDARIES

**QUESTION:** Has the State Soil Conservation Board authority to change the boundaries of two adjoining soil conservation districts by transferring a portion of one district to the other upon request from the land owners of the area to be transferred and by the governing body of each of the districts?

*To State Soil Conservation Board, Florida State University:*

Section 582.16, Florida Statutes, 1941, authorizes and provides procedure, for including additional territory within an existing soil conservation district. Section 582.15, referring to boundaries of soil conservation districts, contains this language:

“ . . . but in no event shall they include any area included within the boundaries of another soil conservation district organized under the provisions of this chapter.”

It is my opinion that the State Board does not have authority to change boundaries of districts under the circumstances and in the manner set up in the question. Need for legislation is indicated.

June 7, 1948.—048-187.

##### AUTHORITY OF BOARD—APPROPRIATIONS— ACQUISITION OF MACHINERY

**QUESTION:** A soil conservation district acquired needed machinery under a lease agreement with a dealer in such machinery, the agreement providing for a substantial advance payment and monthly rentals for 18 months, the purchaser having the privilege of purchase by applying all payments toward the purchase price, etc. May the funds appropriated by chapter 23941, acts of 1947, section 582.33, Cum. Supp., allocated to the soil conservation district be used for the payment of such rents?

*To State Soil Conservation Board, Florida State University:*

Section 1 of chapter 23941 (582.33 (1) Cum. Supp.) authorizes soil conservation districts to acquire, with consent of the soil conservation board, by purchase, exchange, lease, or otherwise, machinery and equipment which the supervisors of the district deem necessary or desirable to carry out the purposes of the district.

Section 3 of that chapter, section 582.33 (3) Cum. Supp., appropriates certain funds for semiannual apportionment to the districts and concludes as follows:

“ . . . provided, however, that the sum herein appropriated shall be used solely for purchase of machinery and equipment and shall not be used to pay current expenses or for administrative purposes.”

It is my opinion that the word “purchase” in the quoted proviso is to be construed broadly enough to include those methods of acquisition of



machinery as authorized in section 1, that is to say, acquisition by "purchase, exchange, lease."

The question is answered in the affirmative.

May 21, 1948.—048-174.

#### LOANS TO PURCHASE EQUIPMENT—REPAYMENT— APPROPRIATIONS

QUESTION: Where a soil conservation district borrowed money with which to purchase a combine and seed cleaner needed to carry out the objects and purposes of the district, may such loan be repaid from funds allocated and distributed to the district from the appropriation provided in section 582.33, Cum. Supp. (sections 1, 2, 3, of chapter 23941, Laws of Florida, 1947)?

*To State Soil Conservation Board, Florida State University:*

Section 582.33, Cum. Supp., authorizes the several soil conservation districts, with the consent of the State Soil Conservation Board, to acquire machinery and equipment which the supervisors of the district deem necessary to carry out the objects and purposes of the district. The section also makes an appropriation for the purchase of such machinery and provides for semiannual apportionment of the appropriation in equal parts to the several soil conservation districts.

It is my opinion that the soil conservation district in question may repay the money borrowed for the purchase of the described machinery and equipment from funds allotted to that district out of the appropriation contained in the aforementioned section of the statutes.

This opinion is not to be construed as holding that soil conservation districts may lawfully borrow money with which to purchase machinery or equipment.

April 2, 1948.—048-113.

#### CONSERVATION BOARD—DISBURSEMENT OF FUNDS

QUESTION: The supervisors of a soil conservation district borrowed money from a bank to purchase a tractor. May the State Soil Conservation Board lawfully disburse to the district the latter's pro rata portion of funds appropriated by chapter 23941, Laws of Florida, 1947, and released by the budget commission, to be used by the district to repay the bank loan?

*To State Soil Conservation Board, Board of Control Office, Florida State University:*

The supervisors of the district have requested disbursement to the district of the sum of \$1388.89, its pro rata part of the \$50,000 released to the State Board by the budget commission for the purposes of chapter 23941.

Chapter 23941 (section 582.33, Cumulative Supplement), requires the consent of the State Soil Conservation Board to purchases of equipment by the districts. Assuming that the board has authorized the purchase of the tractor involved in the question or has approved its purchase, and the sum requested by the district is not in excess of its pro rata part of the funds released, it is my opinion that the board may lawfully disburse the funds to the district to be used for repayment of the money borrowed from the bank. This is not to be construed as holding that a district may lawfully borrow money for the purchase of equipment.

August 20, 1947.—047-272.

CONSERVATION DISTRICTS—WATER LEVEL CONTROL—  
ADOPTION OF REGULATIONS

QUESTION: What procedure is to be followed by a soil conservation district for adoption of regulations to set the water level of lakes and control run-off?

*To Mr. C. Parke Anderson, Chairman, Board of Supervisors, Highlands Conservation District, Avon Park, Florida:*

Section 582.22, Florida Statutes, 1941, provides in part that:

"The regulations to be adopted by the supervisors under the provisions of this chapter may include:

"(1) Provisions requiring the carrying out of necessary engineering operations, including the construction of terraces, terrace outlets, check dams, dikes, ponds, ditches, and other necessary structures;

\* \* \*

"(5) Provisions for such other means, measures, operations and programs as may assist conservation of soil resources and prevent or control soil erosion in the district, having due regard to the legislative findings set forth in this chapter."

Section 582.21, Florida Statutes, 1941, sets forth the procedure to be followed in the adoption of such regulation. Said section reads as follows:

"The supervisors of any district shall have authority to formulate regulations governing the use of lands within the district in the interest of conserving soil and soil resources, and preventing and controlling soil erosion. The supervisors may conduct such public meetings and public hearings upon tentative regulations as may be necessary to assist them in this work. The supervisors shall not have authority to adopt such land-use regulations until after they shall have caused due notice to be given of their intention to conduct a referendum for submission of such regulations to the owners of lands lying within the boundaries of the district, for their indication of approval or disapproval of such proposed regulations, and until after the supervisors have considered the result of such referendum. Copies of such proposed regulations shall be available for the inspection of all eligible voters during the period between publication of such notice and the date of the referendum. The notices of the referendum shall recite the contents of such proposed regulations, or shall state where copies of such proposed regulations may be examined. The question shall be submitted by ballots, upon which the words 'For approval of proposed land-use regulations for the conservation of soil and prevention of erosion' and 'Against approval of proposed land-use regulations for conservation of soil and prevention of erosion' shall appear, with a square before each proposition and a direction to insert an X mark in the square before one or the other of said propositions as the voter may favor or oppose approval of such proposed regulations. The supervisors shall supervise such referendum, shall prescribe appropriate regulations governing the conduct thereof, and shall publish the result thereof. All owners of lands within the district shall be eligible to vote in such referendum. Only such land owners shall be eligible to vote. No informalities in the conduct of such referendum or in any matters relating thereto shall invalidate said referendum or the result thereof if notice thereof shall have been given substantially as herein provided and said referendum shall have been fairly conducted.

"The supervisors shall not adopt such proposed regulations unless at least a majority of the votes cast in such referendum shall have been cast for approval of the said proposed regulations. The approval of the proposed regulations by a majority of the votes cast in such referendum shall not be deemed to require the supervisors to adopt such proposed regulations. Land-use regulations adopted pursuant to the provisions of this section by the supervisors of any district shall be binding and obligatory upon all owners and occupiers of land within such districts.

"Any owner of land within such district may at any time file a petition with the supervisors asking that any or all of the land-use regulations adopted by the supervisors under the provisions of this section shall be amended, supplemented, or repealed. Land-use regulations adopted pursuant to the provisions of this section shall not be amended, supplemented, or repealed except in accordance with the procedure prescribed in this section for adoption of land-use regulations. Referenda of adoption, amendment, supplementation, or repeal of land-use regulations shall not be held more often than once in said months."

### CONTROL OF HONEYBEE DISEASES

July 1, 1947.—047-180.

#### SECOND-HAND HIVES—SHIPMENT OF BEES

QUESTION: Would chapter 23674, Laws of Florida, 1947, repeal section 584.02, Florida Statutes, 1941?

*To Mr. Arthur C. Brown, Plant Commissioner, State Plant Board, Gainesville, Florida:*

In replying to the question, attention is invited to the fact that only sections 584.05 and 584.06, Statutes of Florida, were amended. Whereas, it may be true that parts of section 584.02, Florida Statutes, 1941, were amended by implication, it is for the courts to determine that the statutes have been amended by implication.

It should be noted that chapter 23674, Laws of Florida, 1947, deals only with the shipping and transporting of second-hand beehives, etc., and of bees shipped in packages with comb. Section 584.02, Florida Statutes, 1941, requires certificate of inspection to accompany shipment of bees into the state with or without combs or honey. The provisions of section 584.02 must be complied with prior to shipping bees into the state in combless packages.

Exhibit marked "C" furnished with request for opinion does not set forth the law as it presently stands; a proper presentation should include section 584.02, Laws of Florida, 1941, and section 584.05 should appear as it is amended by chapter 23674, Laws of Florida, 1947. These corrections should be made to correctly revise the booklet.

All of the laws passed by the 1947 Legislature have not yet been received by this office; therefore, it is not possible, at this time, to state whether the compilation marked exhibit "C" correctly states the law pertaining to the control of honey bees.

April 1, 1947.—047-93.

#### SECOND-HAND FIXTURES—INSPECTION FOR LEAKAGE

QUESTION: Would section 584.05, Florida Statutes, 1941, be constitutional if amended to provide: 1. That it was unlawful to bring, ship, or transport into the state any used or second-hand beehives, honeycombs, supers, frames or other beekeeping fixtures, or

2. That all honey transported into this state shall be subject to inspection for leakage for which an inspection fee of 2½c per pound shall be paid to the State Plant Board, and all such containers and honey shall be destroyed within twenty-four hours after inspection if the containers of such honey shall have sprung a leak?

*To the State Plant Board, Gainesville, Florida:*

To answer question 1, would be in effect to render an opinion on the constitutionality of section 584.05, Florida Statutes, 1941, as it now exists, and as I do not pass upon the constitutionality of any existing statute but assume the same to be constitutional, I cannot answer this question.

Answering question 2, I am unable to see any relation between inspection of honey for leakage and those diseases enumerated in section 584.01, supra, with which the Plant Board is authorized to deal and treat. Nor, am I able to comprehend what relation there is between such diseases and a container of pure disease-free honey being destroyed in the event the container leaks. The board may make and enforce all necessary and reasonable rules and regulations to control, eradicate or prevent the introduction or spread of diseases among honey bees, but that is the maximum length to which it can go. I am not passing upon the question of the proposed amendment as being unlawful interference with interstate commerce until the former serious objections which I have mentioned are clarified.

March 10, 1947.—047-73.

#### INFECTIOUS DISEASES—SHIPMENT OF HIVES

**QUESTION:** May the State Plant Board legally promulgate a rule providing that out-of-state apiaries be free from infectious and contagious diseases for a period of two years prior to the shipment of bees into the state of Florida?

*To the State Plant Board, Gainesville, Florida:*

I am not an entomologist and I will not pass upon the reasonableness of (a) the two-year period or (b) that not only must the hive of bees, proposed to be shipped, be free from infectious and contagious diseases but also, that the apiary must likewise be free of any such diseases. My opinion will discuss the authority of the board to promulgate rules and regulations.

The Legislature in enacting chapter 584, Florida Statutes, 1941, declared the policy and purpose thereof, conferring upon the Plant Board the power to enact rules and regulations, to promote the purposes and spirit of the legislation and to carry it into effect. The Legislature in said enactment declares the intent and purposes of the law to be, to prevent, control and eradicate infectious and contagious diseases among honey bees (section 584.01, Florida Statutes, 1941).

Section 584.02 provides:

"All honey bees (including bees in wire cages, with or without combs or honey) shipped or moved into the state of Florida shall be accompanied by a certificate of inspection signed by the state entomologist, state apiary inspector or corresponding official of the state or country from which such bees are shipped or moved. Such certificate shall certify to the apparent freedom of the bees, and their combs and hives, from contagious and infectious diseases and must be based upon an actual inspection of the bees themselves within a period of sixty days preceding date of shipment; provided, that when honey bees are to be shipped into this state from other states or countries wherein no official apiary inspector or state entomologist is available, the state plant board of Florida may issue permit for such shipment upon presentation of suitable evidence showing such bees to be free from disease."



This section fixes the minimum period of time that the shipment must be free from disease. The board would have no authority to shorten this period but there is not prohibition upon the board's lengthening the period so long as it is reasonable and necessary in effectuating the purposes and intent of the legislation. This becomes more apparent when the purposes of chapter 584, *supra*, are kept in mind, together with section 584.04, which provides:

"The plant board, through its agents or employees, may require the removal from this state of any honey bees or beekeeping fixtures which have been brought into the state in violation of the provisions of this chapter, or if finding any honey bees or fixtures infected with any contagious or infectious disease, or if finding that such bees or fixtures have been exposed to danger of infection by such a disease, may require the destruction, treatment or disinfection of such infected or exposed bees, hives, fixtures or appliances."

The foregoing section authorizes the board to destroy or treat bees in this state that are infected or diseased, regardless of the fact that they have just arrived in the state bearing the foreign entomologist's certificate that they are free of disease. This being true, is it not logical to conclude that the board could have prevented their shipment into the state irrespective of the certificate as provided in section 584.02, *supra*. Since the board is authorized to prevent such shipment, then it must follow as a necessary corollary that the sixty-day provision is not to be construed as a maximum length of time the bees may be required to be shown to be free of disease.

The Florida Supreme Court said, in discussing the law as being administered by you,

"Administrative officers must necessarily be given some latitude in the administration of an act of this character. The paramount consideration is saving the industry threatened, and so long as the act is administered with this purpose in view and with due respect to individual rights, the officers whose duty it is made to execute it will not be interfered with. Like constitutional guarantees, such acts must be administered with reference to the public as well as the individual, and, when these interests run counter, that of the individual must give way." (*Richardson v. Baldwin*, 124 Fla. 233, 168 So. 255, 257.)

My answer to the question, as conditioned in paragraph 2, page 1, is affirmative.

March 9, 1948.—048-84.

#### BEES—DISEASES—REMOVAL OR DESTRUCTION

**QUESTION:** Where a person has been tried and convicted of a violation of the embargo established by section 584.05, Statutes of 1941, as amended by chapter 23674, Laws of 1947, can he be required, in addition to the payment of the penalty imposed by the court under amended section 584.06, Statutes of 1941, as amended by chapter 23674, Laws of 1947, to either remove the bees from the state or destroy them?

*To State Plant Board, Honorable Arthur C. Brown, Plant Commissioner, Gainesville, Florida:*

Very broad powers for making rules and regulations are given to the state plant board by section 584.01.

Your rule 41-I, as amended, reads as follows:

"Any and all bees and used beekeeping equipment subject to the provisions of Chapter 584, Florida Statutes, 1941, as

amended by chapter 23674, 1947, whether in transit or in the hands of the possessor, may be held for inspection by an inspector of the State Plant Board, regardless of whether or not they are certified, and if such bees or used beekeeping equipment are found to have been moved or transported into the state in violation of the rules or regulations of the State Plant Board, or if found infected with any contagious or infectious disease, such bees or used beekeeping equipment must be deported, destroyed, or otherwise treated within twenty-four hours upon the order of the State Plant Board."

That rule is still in force, and it authorizes the deportation, destruction or treatment of bees and used bee equipment, regardless of certification, if moved into the state in violation of the rules and regulations of the board, or if infected as set out in the rule. In other words, that rule can be fully enforced regardless of the fact that the 1947 amendments of the bee law imposed specific criminal penalties. The criminal penalties are imposed for one purpose, and the destruction, removal or treatment of such bees and equipment authorized for a different purpose. They are cumulative.

In addition to the authority of your rule 41-I, you have in section 584.04 statutory authority for the destruction, removal or treatment of the bees and equipment therein described. That section reads as follows:

"The plant board, through its agents or employees, may require the removal from this state of any honey bees or beekeeping fixtures which have been brought into the state in violation of the provisions of this chapter, or if finding any honey bees or fixtures infected with any contagious or infectious disease, or if finding that such bees or fixtures have been exposed to danger of infection by such a disease, may require the destruction, treatment or disinfection of such infected or exposed bees, hives, fixtures or appliances."

Here again, the imposition of a penalty by section 584.06, as amended, in no manner affects the authority to require removal, destruction or treatment of bees or equipment as provided by section 584.04. It is my opinion that under the last named section, if the bees or fixtures are found to be infected, or if they have been exposed to danger of infection by contagious or infectious disease, the plant board, through its agents or employees, may require their destruction, treatment or removal from the state; and that if the bees or fixtures have been brought into the state in violation of the provisions of chapter 584, including the 1947 amendments, they may be required to be removed from the state, after notice to the person in possession, within a reasonable time to be fixed by your board or its authorized agents or employees, and if not removed in compliance with such notice and time limit, they may be destroyed.

## STATE LIVESTOCK SANITARY BOARD

May 8, 1948.—048-156.

### TORT ACTIONS AGAINST BOARD

QUESTION: May an action in tort be maintained against the State Live Stock Sanitary Board?

*To Honorable J. V. Knapp, State Veterinarian:*

The State Live Stock Sanitary Board is a state agency, created by the Legislature for a public purpose and through which the state exercises certain of its sovereign powers. The board, therefore, is clothed with the state's immunity from suit, which immunity can be waived only in accordance with the terms of section 22, article 3, of the Florida Constitution, which provides: "Provision may be made by general law for bringing

suit against the state as to all liabilities now existing or hereafter originating."

A reading of the statutes relating to the Live Stock Sanitary Board reveals that the Legislature has not made that board amenable to suits in tort. It is true that section 585.03, 1947 Cumulative Supplement to Florida Statutes, 1941, provides that the board shall be a body corporate and shall have the right to sue and be sued, but these provisions do not constitute a waiver of the board's immunity from actions in tort. Similar statutory provisions relating to the Board of Commissioners of the Everglades Drainage District were considered by the Florida Supreme Court in the case of *Arundel Corporation et al. v. Griffin et al.*, 103 So. 422. There it was held that a statute giving the board all the powers of a body corporate, including the power to sue and be sued, did not authorize an action in tort against that board, which was a state agency.

In the light of the foregoing, it is my opinion that the question is properly answerable in the negative.

July 18, 1947.—047-213.

#### COSTS OF DIPPING—DISPOSITION OF FUNDS

QUESTION: What disposition should be made of the funds paid the State Livestock Sanitary Board, as costs and expenses incurred in taking into custody, feeding, penning, and dipping cattle under the provisions of section 585.30, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

Section 585.30, Florida Statutes, 1941, provides that where the owner of cattle, within any tick eradication area, fails or refuses to dip the same in accordance with law and the rules and regulations of the State Livestock Sanitary Board, the board may seize and dip the same. The expenses of the board incurred in dipping such cattle is a lien upon them which, if not redeemed, may be foreclosed by selling them. The owner may redeem the cattle by paying the costs and expenses. Where the cattle are sold pursuant to such lien the costs and expenses of the board are payable from the proceeds of the sale. It is clear that the board has authority to receive payment of these costs and expenses. The costs and expenses of the board in seizing and dipping such cattle are costs and expenses payable in the first instance from the board's appropriation for the enforcement of the Livestock Sanitary laws of this state (see section 16, chapter 23775, Laws of Florida, acts of 1947); doubtless, the costs and expenses payable under said section 585.30 are in reimbursement of the costs and expenses paid by the board, in seizing and dipping such cattle, from its appropriation.

Section 585.45, Florida Statutes, 1941, as added by section 16, chapter 23775, Laws of Florida, acts of 1947, provides as an appropriation for the enforcement and expenses of chapter 585, Florida Statutes, 1941, such sums of money as may be necessary with certain limitations as to the total amount.

The report and recommendations of the State Budget Commission to the 1947 session of the Legislature, concerning the appropriation for the State Livestock Sanitary Board for the two years beginning June 1, 1947, makes no reference to the costs and expenses to be incurred by the board under section 585.30, although most of their other items of expense are mentioned in the budget.

The Legislature and the budget commission in fixing the current budget for the board, may have considered that such expenses were in fact, the expenses of the cattle owners and that collections made by such board for such purposes were in fact reimbursement of state funds expended by the board for the account of the owner.

I am, therefore, of the opinion that such funds should be considered as reimbursement to the board's appropriation and that they should be credited to the same as such and be considered as funds in addition to such appropriation.

August 19, 1947.—047-261.

#### CATTLE—DIPPING CARD RECORD—FORM OF DIPPING RECORD

**QUESTION:** What change, if any, should be made in form 34, dipping card record, used by the Livestock Sanitary Board, in the light of changes made by section 12, chapter 23775, Laws of Florida, acts of 1947, in connection with cattle dipping?

*To Dr. J. V. Knapp, State Veterinarian,  
State Livestock Sanitary Board:*

In the light of the amendment made in section 585.27, Florida Statutes, 1941, by section 12, chapter 23775, Laws of Florida, acts of 1947, allowing reimbursement in the sum of ten cents per head instead of a certain part of the cost as did the prior law, I am of the opinion that the form of the certificate of the owner, as printed on the back of the said dipping card record, should be changed.

It is suggested that the said certificate be changed to read as follows:

"I hereby certify that I have incurred expenses in collecting, driving and dipping ..... head of cattle, for which I am entitled to be reimbursed as provided by section 585.27, Florida Statutes, 1941, as amended.

"I further certify and represent that the above report includes all cattle owned or controlled by me, and that I have faithfully complied with the Laws of Florida relating to dipping cattle."

instead of its present form. There need be no change in the form for approval by the board.

March 3, 1948.—048-77.

#### ANTI-CHOLERA SERUM AND VIRUS DISTRIBUTION

**QUESTIONS:** According to the provisions of section 585.32, Florida Statutes, 1941, as amended by chapter 22517, Laws of Florida, 1945, relating to the distribution of anti-hog cholera serum and hog cholera virus by the State Live Stock Sanitary Board: 1. What is the definition of "bona fide farmer"?

2. What is the definition of "commercial and/or commercial garbage fed herds of hogs"?

3. Are the administrators of the serum and virus, consisting of employees of the board, licensed veterinarians and recognized and approved agents of the state and federal governments, vested with the duty and power to determine whether applicants are eligible to receive serum and virus, either at cost or without cost, as the case may be, and to approve or disapprove applications as a result of such determination?

4. Are state agencies such as the state hospital, farm colony, prison farm and state road camps entitled to free serum and virus?

*To Honorable J. V. Knapp, State Veterinarian:*

The foregoing questions will be considered in their numerical order. For the purposes of this opinion, the statute under discussion is assumed to be a constitutional one.



(1) Subsection 2 of the section in question provides:

"Except as provided in subsection (4), the board shall distribute . . . anti-hog cholera serum and hog cholera virus without cost thereof to any bona fide farmer who is an owner of swine in Florida. . . ."

While there are many kinds of farmers and a particular definition may not fit every case, the term does signify, in both its popular and legal senses, that cultivation of the soil for the production of crops is the chief, even though not necessarily the only, occupation of the person. (See 35 C.J.S. 748, 751.)

The term "bona fide," as used in the statute under discussion, adds nothing to the meaning of the term "farmer" except to emphasize that meaning. The literal translation of "bona fide" is "by or in good faith," but the term also has the derived meaning of "real." I think that here the Legislature employed the term in its latter sense and that "bona fide farmer," as used in this statute, means a person whose chief occupation in reality is cultivation of the soil for the production of crops.

(2) Subsection 4 of the section in question provides:

"The board shall distribute said serum and virus at a price equal to the cost thereof to said board, to owners of hogs in Florida for use on commercial and/or commercial garbage fed herds of hogs in Florida and all other owners of hogs in Florida who are not entitled to free distribution of said serum and virus under subsection, (2). . . ."

A "herd" is defined as a number of beasts, more than a few, assembled and kept together as one drove (*Boland v. Cecil*, 150 P. 2d (Cal.) 819). The word "commercial" has a rather wide range of meanings, but in the foregoing term "commercial and/or commercial garbage fed herds of hogs," when considered in connection with subsection 1 of section 585.32, it is my opinion that it is used to denote herds of hogs that are raised as business enterprises, which enterprises, if engaged in by farmers, are not merely incidental and subordinate to the chief occupation of cultivating the soil for the production of crops.

(3) Subsection 2 and, by reference, subsection 4 of section 585.32, provide that the State Livestock Sanitary Board shall distribute the serum and virus through employees of the board, licensed veterinarians and recognized and approved agents of the state and federal governments, to owners of swine "making application therefor upon blanks to be furnished by said board and approved by the administrator of said serum and virus."

It would appear from the foregoing quoted provision that the administrators of the serum and virus are charged with a certain duty with respect to the approval of applications, but I do not think this provision means that the administrators must approve all applications presented to them, regardless of the facts involved. However, the administrators are not state or county officers elected by the people or appointed by the governor, so are not constitutionally empowered to perform governmental functions involving independent official judgment and authority. As employees or agents of the board, their duties are to be performed as directed by the board and under the board's supervision.

Therefore, it is my opinion that, acting under instructions of the board and in accordance with its rules and regulations, the administrators are authorized to approve applications that are susceptible of approval as a matter of routine; but where there is doubt that an applicant is eligible to receive serum and virus, either at cost or without cost, as the case may be, the administrator is without power to determine the question of such applicant's eligibility and must transmit the application to the board for its decision.

4. It is my opinion that state agencies such as the state hospital, farm colony, prison farm and state road camps are not "bona fide farmers" within the meaning of section 585.32, so are not entitled to serum and virus without cost.

March 6, 1948.—048-82.

#### CHOLERA SERUM—APPROPRIATION—DISTRIBUTION

**QUESTION:** The State Livestock Sanitary Board has exhausted its current annual appropriation of \$200,000 for the purchase and distribution of anti-hog cholera serum and hog cholera virus. May that board lawfully use unneeded funds appropriated for the salaries and expenses of the agency by the 1947 general appropriation act for the purchase of anti-hog cholera serum and virus for free distribution to bona fide farmers in the manner authorized by chapter 22517, Laws of Florida, 1945 (section 585.32 Cum. Supp.)?

*To Honorable Homer G. Graham, Budget Director:*

The only fund appropriated by the Legislature for the free distribution of serum and virus is the \$200,000 annual appropriation of section 585.32 (6). However, the fact that the fund has been exhausted does not necessarily mean that no serum or virus may be dispensed without cost. Chapter 23775, Laws of Florida, 1947, amending section 585.16, greatly extended the power, authority and duties of the State Livestock Sanitary Board in certain respects. That amended section provides that whenever any of the diseases therein described, including hog cholera, shall exist anywhere in the state, or whenever it is deemed necessary or advisable to do so, the board may treat "any infected, exposed, suspected or susceptible animal," etc. Thus, the duty to treat animals under the circumstances set out is ample authority for the board to purchase and maintain a suitable supply of serum and virus to enable it to treat such animals with or without cost under proper circumstances as contemplated by that section and the other sections of the statute which give the board broad powers to prevent the spread of animal diseases. The board may use for such purchases the unneeded fund referred to in the question or any other of its funds available for the performance of its statutory duties not restricted to other purposes. On a request for serum and virus by a bona fide farmer, the board would have authority to treat the hogs of the applicant without charge for the serum if the board deemed it "necessary or advisable" to treat the applicant's hogs as being either "infected, exposed, suspected or susceptible" within the meaning of amended section 585.16.

October 19, 1948.—048-328.

#### FUNERAL EXPENSE—EMPLOYEE—STATE LIVESTOCK SANITARY BOARD

**QUESTION:** Is the State Livestock Sanitary Board authorized to pay the funeral expenses of one of its employees who was killed while in the performance of the duties of his employment?

*To Honorable J. V. Knapp, State Veterinarian:*

Among the laws relating specifically to the powers of the State Livestock Sanitary Board, I am aware of no provision which would authorize that board to defray the funeral expenses of a deceased employee.

It is possible that in the instant case such expenses, or a portion thereof, are payable under the workmen's compensation law. However, this is a matter for determination by the Industrial Commission, after being fully advised as to the merits of such claim as might be filed with it.

**BOARD OF FORESTRY**

August 27, 1948.—048-286.

**SALARY INCREASE—STATE FORESTER**

**QUESTION:** The annual salary of the state forester is fixed by section 589.05 at \$5,000. In the Budget Commission's report to the Legislature for the 1947 session there appears the request of the State Board of Forestry for a total salary appropriation of \$607,533.20 for forest service, including a salary for the state forester in the amount of \$6,000. The Budget Commission recommended only \$100,000 and in the general appropriation bill the Legislature appropriated only \$100,000 for salaries in the forest service work. Early in this year the agency increased the salary to \$6,300, and as of July 1, 1948, increased it to \$6,720. May the state comptroller lawfully issue state warrant in the amount of \$560.00 per month as state forester's salary during the current fiscal year?

*To Honorable C. M. Gay, State Comptroller:*

The first problem is to determine whether the request of the Budget Commission for approval of \$6,000 salary and subsequent action of the commission and the Legislature had the effect of increasing the salary to \$6,000. I have made a careful investigation of the facts in connection with the agency's request for increase of the salary to \$6,000 and its disposition by the Budget Commission and the Legislature.

Briefly, it seems to have been clear to the Budget Commission and the Legislature that there would be available to satisfy the request for \$607,000 the following funds: \$100,000 in federal funds, \$285,000 to be collected from landowner and county assessments, and undetermined portion of a special appropriation to the board in the amount of \$275,000 annually, provided by chapter 24123 of the 1947 session, and the \$100,000 appropriated to the board in the general appropriation act for salaries in connection with forest service. Actually those funds have produced the amount requested, and I am informed that the total personnel listed in the request for \$607,000 are, and have been, on the payroll, and that ample funds are available. I think the foregoing facts are sufficient indication of legislative approval of the proposed increase of salary to \$6,000 as set up in the Budget Commission's report to bring it within the case of *Williams v. Lee*, 191 So. 697, and it is my opinion that the salary increase to \$6,000 was authorized.

In view of the fact that the Legislature fixed the salary of the state forester, the agency has no authority to further increase it, and approval by the Budget Commission of such attempted further increase by the agency would be ineffective. It would not be lawful for the state comptroller to issue warrant for salary in excess of \$6,000 per annum.

June 5, 1948.—048-193.

**POWERS OF FORESTRY BOARD—EXECUTION OF DEEDS**

**QUESTION:** Does the Florida Board of Forestry and Parks have authority to execute a deed by the use of its seal and signed by the president and secretary?

*To Honorable C. H. Coulter, State Forester, Florida Board of Forestry and Parks:*

The Florida Board of Forestry and Parks is not a body corporate and the adoption of a seal indicating that the board is incorporated is ineffective to give it corporate powers. The board may operate only through the

individual members of the board as a body. A deed of conveyance of lands owned by the board must, in order to be legally executed, be signed by each member of the board. A resolution duly adopted by the board authorizing the conveyance of lands by deed executed in the name of the board by its president and secretary is ineffective to vest the two members with legal authority to convey the lands. The law requires that any conveyance of real property made by a person other than the owner shall be authorized by a formal power of attorney executed with all the formality required for the execution of a deed of conveyance, which power of attorney is required to be recorded in the public records.

The question is accordingly answered in the negative.

February 21, 1948.—048-70.

#### LEGISLATIVE RESEARCH COMMITTEE—EXPENSES

QUESTION: Senate concurrent resolution No. 12, 1947 session, authorized appointment of legislative committee to make a comprehensive survey of all state parks and monuments, and to report to the 1949 session the result of its research, together with its proposed program for an effective integration of state parks and monuments and their future development. May the expenses of that legislative committee incurred in the performance of their duties as set out in the resolution be lawfully paid from funds appropriated for the expenses of the Florida Board of Forestry and Parks under section 589.18, Florida Statutes, 1941?

*To Honorable C. M. Gay, State Comptroller:*

Section 589.18 authorizes the Florida Board of Forestry and Parks to conduct investigations and make surveys of areas of land in the state available and suitable for reforestation, state forests and state parks, and to make recommendations to appropriate state agencies concerning acquisition of such lands.

Senate concurrent resolution No. 12 was adopted by both houses on the last day of the session. The Legislature failed to appropriate any funds for the expenses of the committee. It is my opinion that the expenses of the legislative committee cannot lawfully be paid from funds appropriated for the expenses of the Florida Board of Forestry and Parks.

#### FLORIDA CITRUS COMMISSION

May 29, 1948.—048-181.

#### STATE SENATOR—CITRUS COMMISSIONER

QUESTION: Would it be necessary for a person holding the office of state senator to resign from such office before he could legally be appointed by the governor as a member of the Florida Citrus Commission?

*To Honorable Millard F. Caldwell, Governor:*

It appears that a person cannot lawfully hold the office of state senator and be a member of said commission at the same time. (Article 16, Section 15, Florida Constitution; Chapter 595, Florida Statutes, 1941, as amended, particularly section 595.01, as amended; and *State v. Lee* (Fla.), 7 So. (2d) 110.) The result of a state senator's accepting an appointment to such commission without resigning his former office would appear to constitute a vacating of his right and status as state senator. In re Advisory Opinion to Governor, 76 Fla. 417, 79 So. 874.



## INSPECTION, TESTING, LABELING AND CERTIFICATION OF SEEDS

December 20, 1948.—048-363.

### SEED LAWS—REGISTRATION—FEES

**QUESTIONS:** 1. Should agricultural and vegetable seeds, sold and delivered by Florida seed dealers to persons in other states, be considered receipts of said seed dealers in determining the registration fees payable under section 578.08, Florida Statutes, 1941, as amended?

2. Where such seed dealers fail and refuse to make return of the amount of such receipts to the commissioner of agriculture, or when it is suspected that the returns made may be false, may the commissioner, or his authorized agent, make an inspection and audit the books and records of such dealers for the purpose of ascertaining or verifying the amount of said gross receipts?

3. Where any such seed dealer refuses to permit the commissioner, or his duly authorized agent, access to his books and records for the purpose of inspection and audit, as aforesaid, what procedure should be followed to gain access to such books and records?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

Under section 578.11, Florida Statutes, 1941, as amended, the commissioner of agriculture is required to "sample, inspect, make analysis of and test agricultural and vegetable seeds transported, sold, offered, or exposed for sale or distributed within this state for sowing or planting purposes." The said commissioner has other and further duties under said section 578.11.

Under section 578.08, Florida Statutes, 1941, as amended, "every person before selling, distributing, offering for sale, exposing for sale or handling for sale any agricultural or vegetable seed . . . in the state of Florida shall first register with the commissioner as a seed dealer, giving . . . (certain information) . . . and at the time of registration shall pay to the commissioner an annual registration fee for each . . . place of business based on the gross receipts from the sale of such seeds at each place of business for the last preceding license year, . . ." in the amounts designated by the said statute. All registration fees collected, as aforesaid, are required to be paid into the state treasury and "placed to the credit of the general inspection fund, from which general inspection fund the expenses incident to the enforcement of this law (Florida Seed Law) shall be paid."

Section 578.23, Florida Statutes, 1941, as amended, provides that "every seed dealer shall make and keep for a period of three years satisfactory records of all agricultural and vegetable receipts bought or handled to be sold, which records shall at all times be made readily available for inspection, examination or audit by the commissioner or his duly authorized agents."

In a specific case before the commissioner the seed dealer contends that he goes into other states and takes orders for agricultural and vegetable seeds, which orders are then and there accepted, to be shipped from his place of business in Florida to the purchaser by common carrier at a fixed future time. At the said fixed future time these orders are filled and delivered to the common carrier, FOB, the said dealer's place of business in this state, which common carrier delivers the said seed to the purchasers. No place of business is maintained by the said dealer in such other states.

Section 578.08, Florida Statutes, 1941, as amended, reveals that the registration fee is not based upon the gross receipt of sales in Florida but upon "the gross receipts from the sale of such seeds at each place of busi-

ness for the last preceding license year." Prior laws provided a license tax based upon "seeds purchased or handled to be sold in the State of Florida" (see section 10, chapter 21942, acts of 1943).

I do not think the case of *Wettles v. Gulf Fertilizer Co.*, 78 Fla. 490, 83 So. 298, in point, as the question presented is one of the place of contract and not one of seed sold by or at a place of business in this state. The question is not one of a tax gross sales in this state but a license based upon the amount of gross sales by dealers in seeds doing business in this state. That is, the amount of sales by each place of business in this state. I am, therefore, of the opinion that the license fee is to be determined by the gross sales made by a seed dealer doing business in this state and not upon the actual sales made in this state. The license fee is to be used for the purpose of inspecting seeds handled by dealers doing business in this state and is not a revenue measure. In the light of these observations, the first question should be answered in the affirmative.

Section 578.23, Florida Statutes, 1941, as amended, requires every seed dealer, for a period of three years, to keep records of all seeds bought or handled to be sold, which records "shall at all times be made readily available for inspection, examination, or audit by the commissioner or his duly authorized agents." This shows a clear intent on the part of the Legislature to authorize the commissioner and his agents to examine and audit the books and records of seed dealers for all purposes within his jurisdiction, one of which purposes is to ascertain and collect the registration fees levied and assessed pursuant to said section 578.08. The second question should, therefore, be answered in the affirmative.

Although it appears that under section 578.23, Florida Statutes, 1941, as amended, the commissioner, by himself or through agents, is authorized to make an audit of the books and records of any seed dealer to ascertain the amount of the registration fee to be collected under section 578.08, Florida Statutes, 1941, as amended, the question arises as to what procedure should be followed when any dealer refuses to permit an audit of his books and records.

In the first place it appears that such refusal probably constitutes a misdemeanor under section 578.18-1, Florida Statutes, 1941, as amended and would subject the person making the refusal to prosecution for such offense. Further, the statutes expressly make it the duty of a seed dealer to subject his books to the commissioner for examination and audit. I find respectable authority that such right of inspection and audit may be enforced by a proceeding in mandamus against the seed dealer (see authorities collected in 55 C. J. S. 432, section 223). The commissioner might also refuse to issue any further licenses or renewals until inspection of the books and records as provided by statute is permitted. Although the statute refers to the taxes herein provided as a registration fee, it is also in the nature of a license or privilege tax (in that no dealer may do business in this state until such tax is paid), so as to be within the purview of section 205.10, Florida Statutes, 1941. Under this section the commissioner may estimate the tax from the best information he has and issue a warrant for the collection of such tax, which warrant may be executed by the sheriff of the county wherein the seed dealer is doing business. These observations seem to answer the third question.

This opinion is rendered without reference to the constitutionality of any statute involved.

## CHAPTER XXX

### CORPORATIONS AND BUSINESS TRUSTS

#### COMMON LAW DECLARATION OF TRUST

June 11, 1947.—047-168.

#### PARTNERSHIP INTEREST—SUBJECT TO TAXATION

**QUESTION:** Is the interest of a resident partner in a nonresident general partnership subject to taxation under the laws of this state, and if so, should it be classified as tangible or intangible personal property or otherwise?

*To Honorable C. M. Gay, State Comptroller:*

The interest of a partner in partnership property is personal property. It is not a direct interest in such property but an interest therein consisting of the right of the partners to share in the assets of the partnership after its debts are paid, the equities between the partners adjusted and the partnership accounts settled (*B. A. Lott, Inc. v. Padgett*, 153 Fla. 308, 14 So. (2d) 669; 40 Am. Jur. 129, 209 and 447; 47 C. U. 781), and is subject to taxation in some states (*King v. Board of Canvassers and Registration*, 37 R. I. 254, 92 A. 569).

Although such interest appears to be property, it is my information that the taxing authorities of this state have never construed its laws as including such interest or right in the property of a general partnership as subject to taxation. In this connection Honorable J. M. Lee, late comptroller of the state, on August 11, 1943, issued the following instructions to the taxing officials, to-wit:

“In order that there may be no misunderstanding, you are advised that the interest of a partner in a partnership venture is not taxable as intangible property, unless the partnership is operated under a common law declaration of trusts under sections 609.01-609.06, Florida Statutes, 1941, or is a limited partnership under the law of some other state.”

The foregoing direction of the comptroller was a departmental construction of the tax laws of this state, and two regular sessions of the Legislature have been held without any attempt to change this construction.

Intangible personal property held by citizens of this state is subject to taxation, although not physically present in the state (*Starkey v. Carson*, 138 Fla. 301, 189 So. 385). It would seem that if the interest of a partner in a general partnership is not subject to taxation generally, the same rule should apply with equal force to an interest in a foreign partnership. It can be argued that the Legislature, in providing separate laws for the taxation of personal property in this state, did not intend to create any new sources of revenue, but merely intended to include only such intangible personal property as was already subject to taxation under the general taxing laws.

Under the foregoing circumstances, I think the comptroller should adhere to the administrative ruling of his predecessor, unless and until the Supreme Court holds otherwise or the Legislature sees fit to change existing laws.

## CORPORATIONS FOR PROFIT

July 1, 1948.—048-224.

## MERGER AGREEMENT—REQUIREMENT

**QUESTION:** A merger agreement of corporations "A," "B," and "C," has been filed with the secretary of state. Pertinent features of the agreement are set forth below. Does the agreement comply with the requirements of sections 612.36-612.44, Florida Statutes, 1941, pertaining to consolidation or merger of corporations?

*To Honorable R. A. Gray, Secretary of State:*

In my opinion, such question is properly answered as follows:

(1) The pertinent features of the agreement are summarized as follows: (a) "A" and "B" corporations agree to merge with "C" corporation, the latter to be the continuing corporation; (b) "C" corporation agrees to the merger and to continue under its present corporate name, and to accept delivery, and transfer from "A" and "B" corporations of all their rights, privileges, powers, franchises and all their property, and "C" corporation agrees it will assume, pay and perform the debts, liabilities and duties of "A" and "B" corporations; and (c) the agreement to become operative when adopted by the stockholders of the three corporations as required by state laws and by-laws of the corporations.

The substance of such an agreement is prescribed by section 612.36, Florida Statutes, 1941. Among other things, it is provided that the agreement shall state, "such other facts as are necessary to be set out in a certificate of incorporation, as provided in section 612.03, as well as the manner and basis of converting the share of each of the old corporations into the shares of the new or continuing corporation . . ." in substance, the agreement fails to comply with the requirements of section 612.36.

(2) Section 612.36 requires that "the directors, or a majority of them, of such corporations as desire to consolidate or merge may enter into an agreement signed by them and under the corporate seals of the respective corporations, etc." The agreement under consideration is not signed by the required directors of the respective corporations.

(3) Among other things, section 612.37, provides, with respect to the stockholders' adoption of such an agreement, that "if the votes of the stockholders of each corporation holding stock in such corporation entitling them to exercise at least a majority of the voting power on a proposal to consolidate or merge said corporation with another, or such other proportion of the stockholders as may be prescribed by the certificates of incorporation for votes on said proposal shall be for the adoption of said agreement, etc."

The secretary's certificates with respect to submission of the agreement to the stockholders of the respective corporations, appended to said agreement, set forth that the agreement was submitted to such stockholders and among other things, that at the meeting a majority of the stockholders voted for the adoption of said agreement. It is suggested that, among other things, such a certificate should indicate, by appropriate language, that stockholders holding stock constituting a majority of the voting power voted for adoption of said agreement; and that the certificate of incorporation of the corporation did not require a greater proportion than such majority of voting power on such question. In view of the language of section 612.37, ordinary caution dictates the requirement that there be an affirmative vote of a majority of voting power of all stockholders of the corporation as distinguished from a majority of the voting power of stockholders present at a meeting called to consider the question.



### CORPORATIONS NOT FOR PROFIT

April 29, 1947.—047-130.

#### INSURANCE COMPANY—NONPROFIT CORPORATION

**QUESTION:** Under Florida law, may a Florida Fire and Casualty Insurance Company operate under the charter of a nonprofit corporation?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

I construe from request for opinion that operation of such a company is contemplated under the charter of a nonprofit corporation, as distinguished from the acquisition by a nonprofit corporation, duly organized for one or more of the purposes permitted by law (see chapter 617, Florida Statutes, 1941), of the outstanding stock of such a fire and casualty company organized under the proper laws. No attempt is made here to deal with the latter situation mentioned.

A fire and casualty corporation under the laws must be organized and operate under a charter issued in pursuance of chapter 611, Florida Statutes, 1941 (if a stock company), and applicable insurance laws, or under articles of association and the provisions of chapter 632, Florida Statutes, 1941, if a mutual association and, as such, authorized to engage in the insurance business to the extent and as set forth in such chapter 632. There appears to be no authority for the issuance of a charter in pursuance of the provisions of said chapter 617 for the operation of a fire and casualty business, even though the profits to be derived therefrom are intended to be applied to one or more of the purposes appearing in section 617.01, Florida Statutes, 1941.

### UNIFORM LIMITED PARTNERSHIP LAW

January 25, 1947.—047-57.

#### REQUIREMENT OF GENERAL PARTNER

**QUESTION:** May a limited partnership, composed only of limited partners and with no general partner or partners, be formed in pursuance of the provisions of chapter 620, Florida Statutes, 1941, as amended?

*To Honorable R. A. Gray, Secretary of State:*

It appears that the foregoing question is properly answered as follows:

A limited partnership, as contemplated by said chapter 620, may be formed by two or more persons, as in said law provided, having as members one or more general partners and one or more limited partners. Hence, the foregoing question must be answered in the negative, since the law seems to require at least one general partner in such a partnership.

### CORPORATIONS, GENERAL PROVISIONS

December 9, 1948.—048-359.

#### FILING FEES—ASSESSMENTS AGAINST CAPITAL AND SURPLUS—NO PAR STOCK

**QUESTION:** In calculating and determining the amount of filing fees to be collected from a corporation pursuant to section 610.08, Florida Statutes, 1941, should the surplus of the corporation be added to the capital, especially where the stock of the corporation outstanding is no par stock?

*To Honorable R. A. Gray, Secretary of State:*

In its report required to be filed annually with the secretary of state the reporting corporation is required to show "the number of the shares of the capital stock of such corporation with the par value thereof, the total of the capital stock and if a foreign corporation the amount of its capital stock allocated for use in the State of Florida" (section 610.08, Florida Statutes, 1941). This provision of the statutes seems to draw a distinction between shares of capital stock having par value and those having no par value (see section 610.15, Florida Statutes, 1941), which difference has been held ample basis for classification for excise tax purposes (*Gray v. Central Florida Lumber Company*, 104 Fla. 446, 140 So. 320). It has been held that the filing fees of corporations having par value stock should be based upon the stock outstanding (1931-32 Biennial Report 232; 1935-36 Biennial Report 707), and not upon the actual capital used; however, with no par value stock, although prima facie fixed at one hundred dollars per share, the secretary of state may determine the true value (section 610.15, Florida Statutes, 1941). The capital of a corporation in this state would seem to be the amount paid in as consideration for stock sold "together with additional amounts, if any, as from time to time by resolution of the board of directors may be transferred to capital." (Section 612.21, Florida Statutes, 1941.) Dividends may be paid from surplus but not from capital (section 612.23, Florida Statutes, 1941). There seems to be a distinction in this state between capital and surplus of a business corporation.

The general rule is that undivided profits or surplus forms no part of the capital of the corporation in a strict sense, although they may in a general and broad sense (18 C. J. S. 618, section 193). Surplus may become a part of the capital when distributed as a stock dividend or otherwise made capital by action of the stockholders or directors.

In the light of these observations I do not think that the Legislature intended to draw a distinction between the capital of a corporation having par value stock and one having no par value stock. It, therefore, seems that the surplus of a corporation should not be counted as capital in assessing capital stock taxes under sections 610.08 et seq., Florida Statutes, 1941.

The question should be answered in the negative.

## CHAPTER XXXI

### INSURANCE

#### GENERAL PROVISIONS

January 5, 1948.—048-2.

##### REVENUE CERTIFICATES—USE AS DEPOSIT SECURITY

**QUESTION:** Are City of Jacksonville, Florida, 3% stadium revenue certificates acceptable to the insurance commissioner of this state as a part or all of an authorized or required deposit of an insurer?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The question is limited to deposits of insurers with the insurance commissioner. No attempt is made here to consider the question from the standpoint of investments of insurers beyond the necessity of ascertaining the meaning of certain statutes, mentioned below, related to deposits.

The position is taken here that recourse must be had to the provisions of sections 625.04, 625.05 and 625.06, Florida Statutes, 1941, concerning minimum investments of domestic and foreign insurers, to ascertain the type of securities which may compose the deposits required or authorized by sections 626.25, 635.11 and 635.17, Florida Statutes, 1941. Sections 625.04, 625.05 and 625.06 do not name revenue certificates issued by a municipality, but do provide that among the permitted investments are "... bonds ... of any ... municipality in the United States. ..."

Sections 631.06, 632.07, 638.03, 640.09, 640.10 and 648.02, Florida Statutes, 1941, relating to deposits by various types of insurers and the nature of such deposits, make no mention of revenue certificates of a municipality, but do permit bonds of a Florida municipality among the described securities for such deposits.

Section 649.06, Florida Statutes, 1941, as amended, requires a limited surety company, as contemplated by chapter 649, Florida Statutes, 1941, to deposit with the insurance commissioner bonds or certificates of indebtedness of the United States or "bonds, time warrants, revenue certificates or certificates of indebtedness of any state, county, district or municipality in the United States or of any political subdivision or district of any state," in the amount therein set forth.

It appears that the revenue certificates mentioned are proposed to be issued in pursuance of chapter 21318, Laws of Florida, acts of 1941, as amended. Revenue certificates authorized to be issued by such law, in the manner therein prescribed, are required to provide that only the revenues of the particular utility, department and facility of said city to be improved shall be pledged for the payment thereof. Hence, it appears that the principal and interest of the revenue certificates here involved are payable only from the revenue derived from the stadium to be improved with the proceeds of the sale of such certificates.

Article 9, section 6, Florida Constitution, limits the legislative issuance of state bonds to the purposes of repelling invasion or suppressing insurrection, and provides that counties, districts or municipalities shall have the power to issue bonds (other than refunding bonds), only after the same shall have been approved in an election by a majority of freeholders, as therein provided. The Florida Supreme Court has held that revenue certificates issued by a state department for the construction of a facility, such certificates payable solely from the revenue produced by such facility, are not state bonds within the meaning of this constitutional

provision. (See *Hopkins v. Baldwin*, 123 Fla. 649, 167 So. 697; *Brash v. State Tuberculosis Board*, 124 Fla. 652, 169 So. 218; *State v. Caldwell*, 23 So. (2d) 855.)

In the absence of any decision of supreme court construing the exact meaning of "municipal bonds," or words of similar import, as used in the aforesaid statutes, the decisions cited in the preceding paragraph are strongly persuasive of the conclusion that the revenue certificates involved are not municipal bonds within the purview of said constitutional provision and as contemplated by such statutes. And it is to be noted that in section 649.06, as amended, the Legislature has definitely distinguished between "bonds" and "revenue certificates" of a municipality by naming both among the securities therein described.

In view of the foregoing, in my opinion the question is properly answered as follows:

The provisions of said section 649.06, as amended, relating to the deposit required of a limited surety company, will permit the use in said deposit of the revenue certificates described in the foregoing question, it being understood that the market value thereof would be a question which would have to be decided at the time they were proffered for such deposit. Such doubt exists that revenue certificates of a municipality are bonds of a municipality as contemplated by the aforementioned statutes providing for other deposits of insurers that ordinary caution urges the position, that as to all deposits of insurers, other than the deposit required by said section 649.06, as amended, such revenue certificates should not be accepted by the insurance commissioner.

February 1, 1947.—047-24.

#### OFFICER—COMMISSION SALES—LEGALITY

QUESTION: Is the officer of an insurance corporation authorized under the provisions of section 625.15, Florida Statutes, 1941, to receive commissions on his sales of such corporation's stock, such commissions not to exceed ten per cent of the sale of any of said stock?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Said section 625.15 provides, in part, and in effect, that no officer, agent or other person selling or negotiating stock in any insurance company in this state shall receive either directly or indirectly more than ten per cent of the sale of any of said stock; and that no president, vice president, secretary, treasurer, or director or any other executive officer of any such company shall participate in the commissions received by any person selling or negotiating the sale of any stock of such a company either directly or indirectly.

In my opinion, the question is properly answered as follows:

There appears to be no prohibition in the statute against an officer of an insurance company receiving commissions on sales made by him of such company's stock, provided the commissions are not more than ten per cent of the sale of any of said stock. However, it would seem apparent from such statute that the president, vice president, secretary, treasurer or director or any other executive officer of such a company may not participate in any commissions on such sales made by other persons.

February 1, 1947.—047-23.

#### INDUCEMENT—LEGALITY OF OFFER

QUESTION: An insurance company has sent a circular to its policyholders listing certain medical and surgical benefits to such policyholders. Preceding the itemization of these services and benefits set forth in such



circular is the following statement: "Effective immediately the following benefits will be allowed to our policyholders in addition to the liberal benefits included in the policy they hold. This will be at no extra cost to the policyholders and should result in saving the policyholders many dollars in the near future. They are not part of the policy contract but are a voluntary contribution to the welfare of our policyholders." Does such act on the part of the insurer constitute a violation of section 625.20, Florida Statutes, 1941?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Said section 625.20 provides, in part, that no insurer shall offer, promise, give, sell, or purchase, as inducement to insurance or in connection therewith, any stocks, bonds, securities or property or any dividends or profits, accruing or to accrue thereon, or, except as specified in the policy contract, offer, promise or give any other thing of value whatsoever as an inducement to insurance.

It is assumed that the prices for the medical and surgical services listed in such circular by this insurer to its policyholders are less than the usual prevailing charges for such services, and it is noted that at the conclusion of such itemized services there is the provision that, "All other surgery not listed above will be performed at one half the doctor's usual rate." It would appear, therefore, that in offering the medical and surgical benefits as set forth in such circular, the insurer is offering to give something of value to its policyholders, not specified in the policies of such insurer.

In my opinion, the question is answered as follows:

The offer of this insurer to give to its policyholders the medical and surgical benefits set forth in such circular and not specified in the policy contracts of the insurer, constitutes an inducement to insurance in violation of said section 625.20.

December 7, 1948.—048-354.

#### UNLAWFUL INSURANCE BUSINESS IN CONDITIONAL SALES CONTRACT

**QUESTIONS:** Where, in connection with the sale of a motor vehicle or trailer, "A" (not qualified to engage in the business of insurance in Florida) acquires a conditional sales contract executed by the purchaser of such vehicle or trailer and in connection with such contract, imposes a charge therein for insurance coverage (fire, theft and collision), for said vehicle or trailer, but purchases no insurance with such amount so charged and assumes the position that he himself is carrying the insurance so charged, under such circumstances.

1. Is "A" unlawfully engaged in the insurance business in the State of Florida?

2. Does such conduct of "A" with respect to said item for insurance offend any laws of this state related to the qualifications and licensing of agents of insurance?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

(1) This question is answered in the affirmative—that is to say, in my opinion the collecting and retention by "A" of a charge for insurance coverage (fire, theft and collision), as set forth, and under the circumstances, as outlined constitutes the unlawful engaging in the insurance business in the State of Florida by "A."

(2) No answer seems required for this question in view of the answer to the first one.

## INSURANCE COMMISSIONER

October 1, 1948.—048-318.

DEED OF TRUST—AFRO-AMERICAN LIFE INSURANCE COMPANY—  
PEOPLES BURIAL AND INSURANCE COMPANY

**QUESTION:** Under the statement of facts set forth by the Attorney General in previous opinions 044-104 and 046-203, and additional facts set forth below, may the insurance commissioner now execute quitclaim deed which, in effect, will release any or all of the land described in the deed of trust referred to in such former opinions?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Particular reference is made to such previous opinions mentioned for facts and circumstances concerning the "deed of trust," therein mentioned and described.

The insurance commissioner, in his communication, states that Mr. A. H. Roberts, of the insurance department, who was Assistant Insurance Commissioner under Honorable W. V. Knott at the time this deed of trust was executed, asserts that to the best of his recollection the deed of trust was never accepted or rejected by Mr. Knott, and he does not recall that the same was submitted to or received by Mr. Knott or the insurance department. The insurance commissioner's letter further states that he has not been called upon to accept or reject the deed of trust, and that he has never seen such instrument. The letter, in effect, requests reconsideration of such former opinions in the light of the additional facts.

At the time opinion 044-104 was delivered, Peoples Burial and Insurance Company was operating; and at the time opinion 046-203 was issued, but a little more than a year had elapsed after the date upon which Afro-American Life Insurance Company reinsured the outstanding contracts of insurance of the Peoples Burial and Insurance Company. More than two years have transpired since that last opinion.

For the reasons set forth in such two former opinions concerning this subject, it is reiterated here that there is the barest possibility that some former policy holder of Peoples Burial and Insurance Company claiming under a contract not included in the assumption agreement with Afro-American Life Insurance Company, as mentioned, might assert a claim and might seek the satisfaction of that claim out of the real property involved in said deed of trust. However, the chance of that happening is so remote and, even if attempted, the chance of a court's holding that a valid and enforceable trust had been created, is so negligible that it is recommended that the insurance commissioner assume the risk of such ever happening. Therefore, opinion 046-203 is changed to the extent that the recommendations and advice below are at variance with the conclusions reached in such former opinion.

It is advised and recommended that the insurance commissioner execute an appropriate instrument or instruments releasing the land described in said deed of trust to Peoples Burial and Insurance Company, and in this connection it is suggested that an appropriate manner of release would be by a quitclaim deed with proper recitations therein setting forth the reasons for the quitclaim of the property; and that such property be so released if the following facts exist:

(1) That Afro-American Life Insurance Company has met all the requirements of law relating to deposits, reserves and financial status otherwise with respect to the contracts of Peoples Burial and Insurance Company assumed by the former; and

(2) That Peoples Burial and Insurance Company did not include in the sale of its insurance business to the Afro-American Life Insurance Company the real property described in said deed of trust.

March 16, 1948.—048-95.

DOMESTIC INSURER—REINSURANCE WITH  
UNAUTHORIZED INSURER

QUESTION: May a domestic insurer, engaged in the writing of fire, windstorm, marine, automobile and casualty insurance on property located in this state, lawfully enter into reinsurance agreements with underwriters at Lloyds of London, the effect of which agreements will be to reinsure approximately 95% of all risks accepted by the domestic company, on an aggregate basis, and take credit for such reinsurance insofar as reserves are concerned?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

It is recognized, of course, that underwriters at Lloyds of London are not authorized to engage in business in this state.

Section 626.10, Florida Statutes, 1941, provides that, "No insurer authorized to do business in this state shall reinsure substantially all its risks on property or life located in this state until such reinsurance agreement shall have been submitted in advance to, and has the approval of, the insurance commissioner; provided, that no such contract or agreement of reinsurance shall be made with a company not authorized to do business in this state, and no such contract or agreement shall be valid until approved by the insurance commissioner."

Section 626.11(2) provides that the commissioner shall require insurers of the character described in the question to set aside "unearned portion of premiums in force, computed according to the usual methods." The unearned portion of premiums mentioned is usually referred to as the "premium reserve" required of such an insurer. The premium reserve, generally, may be stated to be the unearned portion of the premium income (see chapter XVII, Insurance Principles and Practices, 3rd Ed., Reigel and Loman, Prentice-Hall, Inc., 1924). This authority observes that such reserve from the standpoint of the state may be regarded as a necessity for solvency, and from the standpoint of the insurer as a fund to pay unearned portions of premiums on cancellations and to provide for reinsurance with other companies if desired. Properly, the manner in which such fund is maintained, credits permitted against the same, etc., as indicated by section 626.11(2) shall be according to usual methods of insurance accountancy. However, to the extent that the provisions of section 626.10 deal with the subjects of reinsurance and such reserve, the intent and meaning of the statute must be observed. It is to be observed that the right of an insurer to credit against the premium reserve of the consideration required for reinsurance ceded to unauthorized insurers is not here dealt with beyond the factual situation presented.

Section 626.10 is not at all clear as to meaning. In the performance of duty under this statute, there is cast upon the commissioner the exercise of discretion and judgment as to what constitutes "substantially all" of insurers' risks within the meaning of such statute; and in the absence of a specific question from the commissioner as to the reasonableness of a general rule upon the subject, or as to his duties under said statute as related to a particular case, no attempt will be made by this office to invade that field of his discretion. Since the statute refers to the singular "reinsurance agreement" and "no such contract or agreement," it might be urged that the statute applies only to one transaction involving one contract of reinsurance. However, in the absence of court construction, the safe course would seem to require the interpretation that the statute applies to one or an aggregate of reinsurance agreements; and that where an insurer from time to time enters into reinsurance agreements, if and when the aggregate thereof involves substantially all risks, all such agreements are subjected to the effects of the statute.

In view of the foregoing, in my opinion the question is answered as follows:

Section 626.10 is to be construed as applying in all cases where, as result of one or more reinsurance contracts with one or more reinsurers, substantially all the risks of an insurer are reinsured. What constitutes "substantially all" the risks of an insurer is to be determined by the commissioner within the reasonable meaning and intent of the words as they are employed in said law. Avoiding any attempt to state what constitutes "substantially all" the risks of an insurer, it is my opinion that approximately 95% of all the risks of an insurer falls within that portion of such risks which would constitute "substantially all" said risks. Hence, it is my opinion that the question should be answered in the negative; that is to say, that this proposed insurer would not be authorized under said section 626.10 to reinsure approximately 95% of all risks with Lloyds of London and/or any other unauthorized insurers and be entitled to credit against the premium reserve to the extent of the consideration required for such reinsurance.

February 27, 1947.—047-64.

#### REAL ESTATE LOANS—INSURANCE INVESTMENTS

**QUESTION:** May loans secured by mortgages on improved real estate, insured by the federal housing administrator, be accepted as a part of the minimum investments of insurance companies applying for certificates of authority, regardless of whether the value of the properties covered by such mortgages is fifty per cent or more than the respective amounts lent thereon?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Each of sections 626.04, 626.05 and 626.06, Florida Statutes, 1941, dealing with the investments required of insurance companies described therein, authorizes investment of assets in mortgages or deeds of trust on improved and unincumbered real estate worth not less than fifty per cent more than the amount loaned thereon, at market value.

Section 518.06, Florida Statutes, 1941, provides that, among others named, insurance companies may (1) make such loans and advances of credit, and purchases of obligations representing loans and advances of credit, as are insured by the federal housing administrator, and obtain such insurance; and (2) make such loans secured by real property or leasehold as the federal housing administrator insures or makes commitments to insure, and obtain such insurance. (Also see section 518.07, Florida Statutes, 1941.)

Section 518.08, Florida Statutes, 1941, provides that "no law of this state requiring security upon which loans or investments may be made, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments, or limiting investments of capital or deposits, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to sections 518.06-518.07."

In view of the foregoing, in my opinion the question is properly answered as follows:

Loans secured by mortgages on improved real property, insured by the federal housing administrator, may be accepted as a part of the minimum investments of insurance companies, up to the amount that the same are so insured, regardless of whether or not the value of properties covered by such mortgages is fifty per cent or more than the respective amounts lent thereon.



December 23, 1947.—047-431.

#### LAND TITLE INSURANCE—MINIMUM INVESTMENTS

**QUESTION:** What minimum investments are required, under provisions of section 626.04, Florida Statutes, 1941, for the Tampa Abstract and Title Company, incorporated under the laws of this state on February 12, 1913, for the purpose, among other things, of insuring and guaranteeing the title to lands, to now qualify to engage in such title insurance business, this company having on only one occasion, in or about the year 1926, obtained a certificate of authority to engage in such insurance business?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

In addition to the title insurance business, this company was authorized by its charter to engage in other businesses. It is indicated in request for opinion that the Tampa Abstract and Title Company had on only one occasion, in or about the year 1926, qualified as a title insurer under the laws of Florida. This opinion is conditioned upon such assumption.

"Domestic insurers and surety companies shall not be licensed to begin business until they are possessed of and have one hundred thousand dollars actually invested in bonds of the United States, of any state, or of any county or municipality in the United States or in mortgages or deeds of trust on improved and unincumbered real estate worth not less than fifty per cent more than the amount loaned thereon, at market value, the same to be approved by the insurance commissioner. Said insurers and surety companies shall also comply with all other provisions of these statutes; provided, however, this section shall not apply to any domestic insurance company chartered prior to the effective date of the revised general statutes of Florida."

The wording of this section is not without ambiguity. Regardless of what the applicable laws may be concerning investments, apparently it was never the legislative intent that companies chartered prior to the effective date of the revised general statutes should not be required to observe other regulatory insurance laws. Hence, the proviso in the foregoing quoted reasonably refers to the investment provisions of the section; and even such provisions and the proviso are to be construed in the light of their legislative history.

At the time this company was organized, chapter 2759, General Statutes, 1906, as amended by chapter 5887, Laws of Florida, acts of 1909, set forth investment requirements prerequisite to issuance of a certificate to a domestic insurance company. Said section 2759 was again amended by chapter 6847, Laws of Florida, acts of 1915, concerning investments of domestic companies, and carried the proviso that, "this shall not apply to any domestic insurance company which has heretofore been chartered by the laws of the State of Florida." Said section 2759 was amended again by chapter 7869, Laws of Florida, acts of 1919, concerning investments of domestic companies, and had the same proviso as that quoted from the 1915 act. Section 4249, Revised General Statutes, provided the following with respect to the investments of domestic insurance companies:

"... Insurance companies incorporated under the laws of this state . . . shall be entitled to such certificate of authority by furnishing evidence to the satisfaction of the said State Treasurer that such company . . . is possessed of and has actually invested at least one hundred thousand dollars in bonds of the United States, or any state, or any county or municipality in the United States, or mortgages or deeds of trust on improved, unincumbered real estate, worth not less than fifty per cent more than the amount loaned thereon, at their market value, and by otherwise complying with the provisions thereof; provided, this shall not apply to any domestic insurance company which has heretofore been chartered by the laws of the State of Florida."

The intent of the provisos found in the 1915 and 1919 acts (sources of those found in section 4249, Revised General Statutes, and said section 626.04), was not to free domestic insurance companies contemplated thereby from any requirement as to investments; but was to exempt domestic insurance companies functioning as such at the time of such amendments to section 2459, General Statutes, 1906, from the additional investment requirements imposed thereby.

The words "domestic insurance company" and "chartered," as used in the proviso in said section 626.04, require examination; and their meaning would seem indicated by the conclusion set forth in the preceding paragraph. A company authorized by its charter to engage in the insurance business, but engaged in other authorized businesses and not qualified to engage in the insurance business, could hardly be termed an "insurance company." Furthermore, while the word "chartered," in its ordinary sense refers to a corporation possessed of letters patent, as used here it is not to be given such a restricted meaning. Letters patent, or "charter," was issued to this company in 1913. But that fact alone did not authorize it to engage in the insurance business. A company "chartered" to engage in the insurance business reasonably contemplates a company which, under state law, has qualified to engage in such business. Thus, it would seem that "chartered" as used here is intended to include not only letters patent to engage in the insurance business but also the certificate of authority which was a prerequisite to any corporation's engaging in such business in this state prior to the effective date of Revised General Statutes.

In view of the foregoing, in my opinion the question is answered as follows:

It does not appear that "prior to the effective date of the revised general statutes of Florida" Tampa Abstract and Title Company was an insurance company qualified to do business in this state, hence it would seem that this company is not included in the proviso of said section 626.04; and to qualify to engage in the title insurance business in this state it must be possessed of the minimum investments described in the other provisions of said section.

November 19, 1948.—048-340.

#### AUTOMOBILE BREAKDOWN INSURANCE—POLICY FORM

QUESTION: A form of policy has been submitted to the insurance commissioner for his approval, such form being identified as "Kare-Fre Motoring, Inc. Plan of Automobile Mechanical and Electrical Breakdown Policy," the insuring company being designated as American Fire and Casualty Company, Orlando, Florida. Also, there has been delivered to the insurance commissioner a proposed form of agreement between one Comer C. Pierce, referred to therein as "Agent," and said insurance company referred to therein as "Company," concerning the aforesaid plan. Are any of the features of said proposed policy, or the proposed method of selling it, and handling of claims under it, inconsistent with law?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

It will be noted that the proposed form of policy identifies Kare-Fre Motoring, Inc., whereas, the agreement proposed is to be between Comer C. Pierce and the insurance company. While I recognize this variance, the conclusions below render inquiry concerning this feature unnecessary. Neither do I inquire into the question of the power of the company, under its charter, to enter into the agreement.

The agreement recites, among other things, that the "Agent" is the copyright owner of the plan of automobile mechanical and electrical breakdown insurance described in the proposed policy, and that with respect thereto, the Company "makes its underwriting facilities available to the Agent," under the terms and conditions set forth in said agreement.

A consideration of the policy form requires a consideration of said agreement. I have carefully examined the provisions of the policy form and the proposed agreement; and it is my opinion that, considered together, such proposed documents contemplate a plan not authorized by our laws. Hence, it is my opinion that the form of policy should not be approved by the insurance commissioner.

## INSURANCE AGENTS

September 7, 1948.—048-290.

### ADJUSTER—LICENSED RESIDENT AGENT

QUESTION: Properly, may a licensed resident agent for an insurance company be issued a license as an adjuster under chapter 23966, Laws of Florida, acts of 1947?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

It is assumed that the question refers to agents of "fire, marine, casualty or surety insurers."

In opinion No. 046-43 (A. G. R. 1945-1946, page 673), I dealt with these three questions:

(1) Is a person who works approximately one-half of his time as special agent of an insurance company on a salaried basis, eligible to be licensed as an insurance agent?

(2) May an independent insurance adjuster be licensed as an insurance solicitor?

(3) Is an insurance adjuster who adjusts claims exclusively for an insurance company on a salaries basis, eligible to be licensed as an insurance agent for such insurance company? In that opinion, I answered all three of the questions in the negative, and in that connection remarked:

"A consideration of sections 625.22, 627.07 and 627.08 leads to the reasonable conclusion that it was the legislative intent to express a rule of public policy that no person who, in connection with regular employment or business, performs services for and is compensated by insurers on a salaried or other basis unrelated to commissions or salaries payable to resident insurance agents for stock and mutual companies for the sale of contracts of insurance (in the manner and as contemplated by sections 625.22 and 627.08) is qualified to be licensed as an insurance agent or solicitor in this state."

The pertinent part of section 627.08 referred to is as follows:

"No person employed by a fire, marine, casualty or surety insurer on a salary basis or representing any such insurer in any capacity except primarily to solicit, negotiate or effect contracts of insurance, surety or indemnity on a strictly commission basis, shall be deemed or held to be an insurance agent or solicitor."

Chapter 23966, Laws of Florida, acts of 1947, provides generally for the licensing and regulation of insurance adjusters. Section 1 of said chapter defines such an adjuster to be, "a person who undertakes, either in behalf of the insurer or insured, to ascertain and determine the amount of any claim, loss or damage payable under any contract of insurance and/or undertakes to effect settlement of such claim, loss or damage." Section 9 of said chapter provides, in part, that, "Any person in this state who holds a current license as a resident agent of an insurer in this state may adjust losses for such insurer in this state without the requirement of obtaining a license under this act."

The question is immediately apparent as to the effect of the last-quoted portion of chapter 23966 upon the quoted part of section 627.08. Since repeals by implication are not favored in our jurisdiction, unless that intention is clearly manifest (e.g., *State v. Gadsden County*, 58 So. 232, 63 Fla. 620; *Dade County v. City of Miami*, 82 So. 354, 77 Fla. 786), and since it would reasonably appear that such laws are to be read in pari materia, it is quite doubtful if there has been such a repeal by implication here as to adjusters, their duties and compensation. However, the authority found in chapter 23966 for a licensed resident agent to adjust losses for the company he represents reasonably indicates it was not the legislative determination that it was inimical to public welfare for such to be done.

In view of the foregoing, in my opinion the question is answered as follows:

Since a licensed adjuster under chapter 23966 may represent an insured as distinguished from an insurer, clearly the answer to the question is in the affirmative. However, to be of material benefit, this opinion should and does proceed further to state that there appears to be no prohibition in the laws precluding the licensed resident agent of one insurer from obtaining license as an adjuster under chapter 23966 and under such license adjusting losses for other insurers. Since section 9 of chapter 23966, as aforesaid, authorizes an agent to adjust losses for the insurer he represents without the requirement of the agent's obtaining an adjuster's license, there appears to be no reason here to attempt to construe the intent and effect of the provisions of said section 9 in the light of the quoted wording of section 627.08.

June 25, 1948.—048-215.

#### LIFE INSURANCE AGENTS—ASSIGNMENT OF COMMISSIONS

**QUESTION:** If the officers of a corporation are licensed, under the laws of Florida, as life insurance agents, is there any provision in the insurance laws of the state that will prohibit the individuals from assigning commissions which they earn as such licensed agents to the corporation of which they are officers?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Sections 627.18-627.20, Florida Statutes, 1941, deal with permissible division of insurance commissions by insurance agents. Specifically, sections 627.19 and 627.20 except life insurers from their effect; and a consideration of the source of section 627.18 (formerly sections 6215 and 6216, Compiled General Laws, 1927), would seem to urge that such section is not applicable to life agents.

There appears to be nothing in the insurance laws prohibiting the delivery by a life agent of commissions earned by him to a corporation of which he is an officer; hence, the question is answered in the negative.

May 13, 1947.—047-135.

#### ADJUSTER—QUALIFICATIONS

**QUESTION:** May the state treasurer lawfully issue license to an individual to act as an independent adjuster, adjusting claims for insurers, when such individual is a licensed resident agent for an insurer or insurers engaged in the fire, marine, casualty or surety insurance business?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

While there is pending before the Legislature at this time an adjuster's qualification bill, the law at this time respecting the licensing of adjusters is confined to subsection (4), section 1, chapter 22737, Laws of Florida, acts of 1945, as follows:



"Each insurance adjuster, whether resident or nonresident, who has not procured a license as agent, and who adjusts losses in this state, shall pay to the state treasurer a license tax of ten dollars per annum."

Since at this time there is no law prescribing any qualifications prerequisite to issuance of license, it would appear that upon payment of the tax required by the above provision of law, license may properly be issued.

On the general question of the propriety of a licensed insurance agent of the kind contemplated by the question engaging in the business of an adjuster, attention is directed to opinions of the attorney general numbered 046-43 and 046-55.

February 18, 1947.—047-56.

#### EXCHANGE OF CONTRACTS—COMMISSION

QUESTION: Heretofore, a duly licensed Florida agent of a life insurer effected the placing of two policies of the insurer on the life of a person in Florida, such contracts of insurance being written on a modified life basis and, in character, actually being term insurance for many years. Such former duly licensed agent is not now an agent of such insurer. The former agent now requests that these policies heretofore delivered to such insured be exchanged for contracts on the insurance annuity form, the insurer being willing to make such exchange on the basis of difference in premium involved and to allow the former agent the difference in commission to which he would be entitled if he were still an agent of the insurer. Is said insurer authorized to pay its former agent a commission in connection with such exchange of policies?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Section 627.20, Florida Statutes, 1941, provides, in part and in effect, that "no insurer, other than life insurers, shall pay any money or commission, or brokerage, or give or allow any valuable consideration" to any person, etc., not a duly licensed agent, for, or because of, service in negotiating or effecting a contract of insurance or for collecting the premiums thereon, with certain exceptions not here pertinent. Said section 627.20 was section 6, chapter 20263, Laws of Florida, acts of 1941.

Section 627.27 provides, in effect, that no person shall act within this state for any life insurance company as an agent in the solicitation or procurement of applications for insurance, unless he has complied with the provisions of applicable laws and has secured a license from the insurance commissioner, which section was a part of chapter 20327, Laws of Florida, acts of 1941. Section 635.21, Florida Statutes, 1941, as amended, makes it unlawful for any foreign insurer to write any policy on the life of a person in this state where the same is applied for in the state, or the medical examination of the insured is made within the state, unless such policy is written or delivered through a licensed "agency" of the insurer in Florida, or "agency" having "territory" in this state. By opinion of this office dated September 16, 1943 (Biennial Report of Attorney General, 1943-1944, page 469), the quoted word "agency," supra, was construed to be synonymous with "agent," and the quoted word "territory" was construed to mean a definite area in the state wherein the agent is authorized to solicit and sell insurance by the company he represents.

There appears to be no definite prohibition in the laws applicable to life insurers similar to those specifically mentioned above applicable to other insurers as prescribed by said section 627.20. However, the exclusion of life insurers from the effects of said section's provisions is not necessarily to be construed as permitting life insurers to do the things therein prohibited; rather it would seem that such exclusion of life insurers was only for the purpose of making the provisions of such section applicable

to insurers other than life insurers. Since only those authorized agents of life insurers mentioned herein may engage in the activities of an agent for such insurers, it would seem that it would not be proper for such an insurer to use its funds to compensate a person for services and activities which would constitute a breach of a Florida law.

In view of the foregoing, in my opinion the question is properly answered as follows:

If the exchange of the policies contemplated by the question is in pursuance of the exercise by the insured of rights under an option authorizing such exchange in the original policies, payment of any commissions in connection therewith may be properly made by this insurer to its former agent under the circumstances set forth; but if such is not the case, this insurer is not authorized to pay such commission to its former agent.

April 17, 1947.—047-108.

#### PAYMENT OF COMMISSION—FORMER AGENT

**QUESTION:** The license of a resident agent of a foreign life insurer qualified to do business in Florida was recently suspended by the insurance commissioner under authority of section 637.31, Florida Statutes, 1941, such suspension effective to September 20, 1947. Prior to the occurrence of any of the incidents which resulted in this agent's suspension, the insurer had entered into a contract with such agent providing for payment by the company to him of a special or overriding commission on all insurance annuity contracts issued to pilots of old and established airlines, which were sold by any of such insurer's agents, regardless of such agent's state of residence or license. Since his license was suspended, this agent has neither solicited business nor performed any other service for the insurer in this state. During such period of suspension, may this insurer pay said agent, in pursuance of such agreement, the aforesaid overriding or special commissions on contracts of the class involved negotiated for the insured by its licensed agents in Florida?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Generally, the laws directly related to division of premiums by agents or to whom commissions may be paid by insurers are sections 627.11, 627.18, 627.19 and 627.20, Florida Statutes, 1941. Of these, sections 627.19 and 627.20, appear by their wording to apply to insurers other than life insurers. It would appear from section 627.25 and the wording of sections 627.11 and 627.18 that such last two sections are not so limited, and pertain to agents of all insurers, including life. Also, as indirectly touching upon the general subject, consideration should be given the effect of section 627.27.

It is assumed that the "special" or "overriding commissions" which this insurer agreed to pay this agent, do not constitute any part of the regular commission payable to the licensed agents writing or negotiating the contracts with respect to which such special or overriding commissions are payable under said contract—that is to say, that no parts of the commissions which otherwise would be payable to such licensed agents are diverted for application to such special or overriding commissions. This opinion is premised upon such assumption.

On February 18, 1947, in an opinion delivered to the insurance commissioner (No. 047-56), I dealt with the question of the propriety of an insurer paying commissions to a former agent of the insurer. The factual situation upon which such opinion was premised is different to that presented here, and reasoning in that opinion is to be construed in the light of the situation there dealt with.

In my opinion, the question is answered as follows:

There is nothing in said sections 627.11, 627.18 and 627.27, or in any other statute, as applied to the factual situation here found and assumed to exist, which appears to prohibit the payment of such special or overriding commissions to the agent of the insurer, whose license now stands suspended, as set forth in, and as is, contemplated by the inquiry.

December 16, 1948.—048-365.

#### INSURANCE ADJUSTER LICENSED AS SOLICITOR

**QUESTION:** May a person now licensed as an insurance adjuster under chapter 23966, Laws of Florida, acts of 1947, be licensed as an insurance solicitor?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

An insurance solicitor is defined to be an individual, resident of this state, employed by a duly licensed insurance agent to solicit contracts of insurance, indemnity, or suretyship, solely on behalf of such agent. (See section 627.08, Florida Statutes, 1941.) Said section further provides that, "No person employed by a fire, marine, casualty or surety insurer, on a salary basis or representing any such insurer in any capacity except primarily to solicit, negotiate or effect contracts of insurance, surety or indemnity, on a strictly commission basis, shall be deemed or held to be an insurance agent or solicitor."

Because of the provisions of said section 627.08, in opinion No. 046-43, Biennial Report of the Attorney General, 1945-46, page 673, I held, (1) that a person who worked approximately one-half his time as special agent of an insurance company on a salaried basis was not eligible to be licensed as an insurance agent; (2) that an independent insurance adjuster could not properly be licensed as an insurance solicitor; and (3) that a salaried insurance adjuster for an insurer was not eligible to be licensed as an agent for such insurer. In opinion No. 046-55, 1945-46 Biennial Report, page 698, I held that a salaried insurance adjuster for an insurer was not eligible to be licensed as a solicitor for a Florida resident agent of such insurer.

In opinion No. 048-290, dated September 7, 1948, I held that a licensed resident agent for an insurance company could be issued a license as an adjuster under said chapter 23996, as conditioned and for the reasons set forth in such opinion.

I recognize that section 9 of said chapter 23966 provides that any person in this state currently licensed as a resident agent for an insurer may adjust losses for such an insurer in this state without the requirement of obtaining license under chapter 23996. As I stated in said opinion No. 048-290, I do not consider that such provision effected a repeal by implication of the above-quoted provision of said section 627.08, but that such laws should be read in *pari materia*; however, the provision in chapter 23966 would reasonably indicate that it was not the legislative determination that it was inimical to public welfare for an agent to adjust losses for the insurer he represents.

I have no decision of the Florida Supreme Court directly construing the effect of the quoted portion of section 627.08. However, in discussing its provisions in the case of *Florida Association of Insurance Agents v. Larson*, 19 So. 2d. 414, the court did not find the facts of the case "offensive to the statute or likely to foment the abuses the statute was designed to prohibit,"—thus recognizing and not questioning its efficacy as a police regulation. I recognize that a solicitor is not compensated by an insurer on "a strictly commission basis;" he is compensated by the agent for whom he is licensed as solicitor. The uncertainty of this provision as related to solicitors is manifest. Nevertheless, in the absence of other court adjudi-

cation, I construe the quoted portion of section 627.08, as related to solicitors, to mean that no one employed by such an insurer on a salary basis or representing such insurer in any capacity including that of adjuster for such insurer, except primarily to solicit, etc., contracts of insurance, surety or indemnity as a solicitor for the resident agent of such insurer is properly qualified to be licensed as such a solicitor.

In my opinion, an adjuster now licensed under chapter 23966 may be licensed as the solicitor for a duly licensed insurance agent in this state. Under his license as such an adjuster, he is authorized to represent an insured as distinguished from an insurer, or insurers other than those represented by the agent for whom he is licensed as a solicitor. After being licensed as a solicitor, should he as a licensed adjuster represent or act for an insurer for whose agent he is licensed as solicitor under such circumstances and conditions and to the extent as to violate the provisions of section 627.08, as I have construed the intent and purpose thereof in the preceding paragraph, he would not be qualified to act as solicitor with respect to the contracts of such insurer.

Remedial and clarifying legislation is required to remove the uncertainty of the law as it now exists with respect to the question here presented.

## FIRE AND CASUALTY INSURANCE

January 2, 1947.—047-11.

### REGULATIONS—CONTRACTS—EFFECT

QUESTION: On April 15, 1946, the insurance commissioner promulgated a ruling, under authority of chapter 22621, Laws of Florida, acts of 1945, relative to fire coverages and providing in part, that "Term policy contracts with annual installment payment of premiums" and "Annual policy contracts with annual renewal certificates and installment agreement endorsements" were permitted to be written in the State of Florida for "periods not in excess of five years," and that all such contracts "shall be written at the full annual premium for the first year, and at not less than 80% of the full annual premium for all subsequent annual installments"; that "contracts already issued and delivered to assureds may remain undisturbed"; that "all insurers shall be in conformity with this order by June 30th, 1946, as to the 80% feature pertaining to installments." Prior to promulgation of such ruling, contracts of the nature described were written by insurers in Florida at the rate of 75% of the first year's premium for the succeeding four years, and many of these former contracts are still outstanding; that, as to certain of such outstanding contracts the endorsements allowing payment of renewal premium in annual installments do not specify a limit of five years. Are the last named contracts affected by the aforesaid regulation?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The efficacy of this regulation is considered here only to the extent required by the foregoing inquiry.

It seems that the ruling is applicable only to those "term policy contracts with annual installment payment of premiums" and "annual policy contracts with annual renewal certificates and installment agreement endorsements," as described in said ruling, written subsequent to the promulgation of such ruling. This is apparent from the wording of the ruling to the effect that such contracts "will be permitted to be written . . . for periods not in excess of five years," indicating contracts issued thereafter; and the further wording that "contracts already issued and delivered to assureds may remain undisturbed."



Therefore, it would seem that the question is properly answered as follows:

Contracts of the nature described in said ruling outstanding at the time of the promulgation of said ruling allowing payment of renewal premiums in annual installments not limited to five years "remain undisturbed" by the ruling.

February 19, 1947.—047-77.

#### CONTRACTS—RULES FIXING RATES

**QUESTION:** There are outstanding in Florida fire insurance contracts hitherto issued to insureds on the terms of 100% of premium for the first year and renewable from year to year without any specified time limit by the insured's paying annually 75% of such first year's premium. Does the insurance commissioner have authority under chapter 629, Florida Statutes, 1941, as amended, to promulgate a rule or regulation fixing different rates for such contracts after the same have run for a period of five years from date of issuance?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

This question stems from a former question and my answer thereto (opinion No. 047-11). Recourse to that opinion evidences that on April 15, 1946, the insurance commissioner promulgated a ruling, effective June 30, 1946, relative to fire coverage and providing, in part, that term policy contracts with annual installment payment of premiums and annual policy contracts with annual renewal certificates and installment agreement endorsements were permitted to be written in this state for periods not in excess of five years; that all such contracts "shall be written at the full annual premium for the first year, and at not less than 80% of the full annual premium for all subsequent annual installments"; that "contracts already issued and delivered to assured may remain undisturbed"; that prior to promulgation of such ruling contracts of the nature described were written by insurers at rate of 75% of the first year's premium for the succeeding four years; that, as to certain of said outstanding contracts, the endorsements permitting renewals upon annual payment of premium do not specify a five-year limit, and the question was asked as to whether or not the last-named contracts were affected by the aforesaid ruling. I answered that question in the negative because the direct wording of the regulation excluded from its effect contracts theretofore issued and delivered.

The question here, involves such type of contract with option of the insured to renew annually by payment of the required premium without any specified time limit with respect to such right; and the authority of the insurance commissioner to promulgate such a regulation as is contemplated by the question depends upon the existence of certain elements, which are here mentioned.

Said chapter 629 is apparently a valid exercise of the police power by the state. (See *U. S. v. South-Eastern Underwriters Association, et al.*, 322 U. S. 533, 88 L. Ed. 1440, and Public Law No. 15, 79th Congress (McCarran-Ferguson Act).) The provisions of article 1, section 10, U. S. Constitution, prohibiting state law which impair rights under existing contracts must yield to the effects of a valid police regulation. (*Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165; *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 79 L. Ed. 413.) The test of the authority of an administrative officer to promulgate regulations is whether or not the statute defines a pattern to which such regulations may be made to conform. (*Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495.)

Chapter 629 sets forth a legislative plan or pattern by which a regulation promulgated thereunder by the insurance commissioner may be tested for conformity thereto. The factors which must guide that official in his rules and orders pertaining to insurance rates are (1) such rates

shall not be unreasonably high or excessive; (2) they must be adequate for the safeness and soundness of insurers; and (3) they must not be unfairly discriminatory between risks in the state involving essentially the same hazard. For example, see sections 629.06(1), 629.09(1),(2),(3). In resolving certain of these factors, the act makes available to the insurance commissioner adequate data. (Sections 629.06, 629.07 and 629.14.)

Section 629.09(5) provides that changes in rates resulting from an order of the commissioner directing or approving alterations or revisions in rating systems shall become effective at a reasonably early date to be set by the commissioner following the date of such order and "shall be applied to policies written on or after such effective date."

In view of the foregoing, in my opinion the question is properly answered as follows:

It would seem reasonable, in view of the purpose and intent of said chapter 629, that contracts of the nature of those contemplated by the foregoing question may be subjected to regulation with respect to applicable rates as indicated in the question; provided, of course, that any regulation or order changing rates theretofore existing shall be in pursuance of the insurance commissioner's determination that such change is necessary to provide rates conforming to the requirement of those factors set forth in the act and aforementioned. While it is not considered that the quoted words from said section 629.09(5) may be construed as an impediment to such regulation by the insurance commissioner, yet the doubt such wording casts upon that authority is not to be ignored. Since the Legislature is meeting soon in its regular 1947 session, it is suggested that prior to any attempt to regulate the rates of those contracts contemplated by the foregoing question, such doubt existing with respect to authority of the insurance commissioner to so regulate be removed by an appropriate amendment of said section 629.09(5), if such an amendment is desired.

### MUTUAL FIRE INSURANCE ASSOCIATIONS

May 27, 1948.—048-182.

#### CERTIFICATE OF AUTHORITY—MUTUAL STOCK COMPANY— FOREIGN CORPORATION

QUESTION: Should a certificate of authority be issued, by the insurance commissioner of Florida, to the Farmers Fire Insurance Company of Pennsylvania, as a stock company?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The answer to this question depends upon the status of the insurance company in question, under the laws of this state and of its home state, as a stock company or otherwise. I have been furnished with certified copies of the amended and restated charter, its by-laws, and have a report of the insurance department of Pennsylvania upon its examination of the corporation. I have also examined the Pennsylvania statutes of 1921 to 1945 mentioned on page 6 of the charter.

From the instruments aforementioned, the company in question was organized by the Legislature of Pennsylvania in 1853, the legislative charter having been amended and extended by or under subsequent acts. On January 7, 1936, the said charter was amended and restated under an act of 1921. This amended and restated charter appears to be the one under which the company is now operating and the one qualified by the secretary of state of this state to transact business within the state.

Under the 1921 act, stock companies doing business under section 202 (b) (1) and (2) of the Pennsylvania statutes, under which the com-

pany in question purports to operate, are required to have a capital of not less than \$200,000, divided into shares of not less than \$10 each (section 206 (b), Pennsylvania statutes). There is nothing in the charter or other instruments exhibited with the request for opinion which indicates the existence of any capital stock of the company. As a matter of fact, the application on file in the office of the insurance commissioner clearly shows that the corporation has no stock. The report of the insurance commissioner of Pennsylvania states that "operations are conducted solely on the stock company plan . . . no dividends are paid by the company."

The amended and restated charter provides in part that "The plan or principle on which the business is to be conducted is the mutual plan or principle . . . for cash premium without any contingent liability for assessment." "The general objects of the company are to make insurances on the Mutual Principle against loss as provided" by the laws of Pennsylvania. "All persons who shall insure with said company . . . shall thereby become members thereof during the period they shall remain insured by said company, and no longer." The affairs of the company are managed by a board of directors to be elected by the members.

A stock insurance company has been said to be one where the stockholders contribute all the capital, pay all the losses, and take all the profits (State v. Willett, 171 Ind. 296, 86 N.E. 68, text 70). A mutual company has been said to be one wherein the members constitute both insured and insurer, and contribute, by a system of premiums or assessments, to the creation of a fund from which losses and liabilities are paid (44 C.J.S. 644, section 104, 18 Appleman, Insurance Law and Practice, 79 et seq., section 1041).

It appears from the foregoing observations that the question should be answered in the negative. The certificate of authority should be issued to the company in question as a mutual one and not as a stock company.

## STATE FIRE MARSHAL

July 23, 1948.—048-245.

### LIQUEFIED GAS DEALER—VIOLATION OF LAW, REGULATION

**QUESTIONS:** A certain dealer in liquefied gas in Sanford, Florida, dug up certain storage tanks for liquefied gas (Butane) belonging to another dealer, without any permission from the state fire marshal or his office, or from the owner of the said tanks, and left the said tanks exposed above the ground within a few inches of a building, without any protection to the valves and fittings on said tanks. The said tanks contained gas and were and are a fire and explosive hazard to the said building and surrounding buildings. 1. Are the acts of this dealer a violation of chapter 24302, Laws of Florida, 1947, of the regulations promulgated thereunder?

2. If a violation, what legal processes may be invoked?

3. If there has been no violation by this dealer of said chapter 24302, are the provisions of chapter 633, Florida Statutes, 1941, (Fire Marshal Act), and the rules and regulations promulgated thereunder sufficient to invoke legal action against this dealer?

*To Honorable J. Edwin Larson, State Treasurer and State Fire Marshal:*

In answer to questions 1 and 2, I will say that chapter 24302, Laws of Florida, 1947, adopted the published standards of the National Board of Fire Underwriters at that time, in which standards it is provided "that container so protected shall not be uncovered after installation until the liquid fuel has been removed therefrom. . . ." (See in the printed pam-

phlet No. 58, adopted January 1947, division II, section 2.2, page 23.) From the affidavits submitted it shows that the liquid fuel was not so removed.

Said chapter 24302 further provides that it is made a criminal offense for any person, firm or corporation to violate any of the provisions of the said act. Whether or not the dealer mentioned has so violated the said act as to make himself liable to criminal prosecution under the act is a matter that must be determined by the prosecuting attorney whose duty it is to prosecute the violations thereof. For that reason I can only suggest that the papers, affidavits and photographs be submitted to the prosecuting attorney of the county whose duty it is to prosecute such violations and request him to take action therein if he deems a crime to have been committed.

In answer to question 3, I will say that I do not find, from the facts submitted, any violation of the provisions of chapter 633, Florida Statutes, 1941, or any of the rules or regulations promulgated thereunder.

July 22, 1948.—048-241.

COUNTY JAILS—POWERS FIRE MARSHAL—  
INSPECTION, CONSTRUCTION

QUESTIONS: 1. Is the state fire marshal authorized under the provisions of section 633.06, Florida Statutes, 1941, or any other laws of Florida, to inspect county jails and to issue orders within the purview of said section 633.06 with respect to fire hazards he may find in connection with any such jails and enforce such orders as he may make relative thereto?

2. Has the state fire marshal, under the aforementioned law, or any other laws of the State of Florida, authority to make recommendations for minimum standards for safety from fire to be observed in connection with the construction of any new county jail in the State of Florida?

*To Honorable J. Edwin Larson, State Treasurer and State Fire Marshal:*

In view of the evident intent and purpose of chapter 633, Florida Statutes, 1941, as amended, relating to the powers and duties of the state fire marshal, and particularly the provisions of sections 633.01 and 633.06, in my opinion the state fire marshal is authorized to inspect county jails and to issue orders with respect to fire hazards, as contemplated by the first question.

It is further noted that the first question also inquires as to the right of the state fire marshal to enforce any such orders as he may issue in connection with fire hazards in jails. Until the state fire marshal shall be confronted with the specific question of the enforcement of any such orders he may issue, there would seem to be no necessity here to go into the question of the enforcement of such an order. In arriving at this conclusion, attention has been given to the powers and duties of county commissioners under section 135.01, Florida Statutes, 1941, and of convict inspectors under certain sections of chapter 952, Florida Statutes, 1941, concerning county jails; however, I see nothing in these provisions of law restricting the duty of the state fire marshal with respect to county jails as set forth in the first sentence of this paragraph.

In answer to the second question, in my opinion county commissioners in erecting a new jail are not required to observe recommendations of the state fire marshal, as contemplated by this question. However, when a jail is built, it is then subject to inspection and orders of the state fire marshal with respect to fire hazards, as found in the answer to the first question.



February 28, 1948.—048-71.

#### PETROLEUM DEALERS—LIABILITIES—BONDS FOR INSURANCE

QUESTIONS: 1. Does the \$25,000 bond, or insurance in lieu thereof, as provided and required of a licensee under section 3, chapter 24302, Laws of Florida, acts of 1947, indemnify each person suffering loss or damage as contemplated by said section up to the limit of such amount, or is such amount the limit of aggregate liability for one accident?

2. Does such bond, or insurance in lieu thereof, indemnify against property damage as well as personal injuries?

3. Would a \$25,000 bodily injury policy be acceptable under said section 3 in lieu of the required bond?

4. Would a general liability policy naming the insured's occupation, but not specifically describing one or more of the businesses he is licensed to engage in under chapter 24302, be acceptable in lieu of said required bond?

5. May the insurance commissioner, in an instance where a licensee evidences insurance coverage in lieu of said bond, require a person to carry both public liability and products liability insurance coverage with respect to the business or businesses he may be licensed to engage in under chapter 24302?

*To Honorable J. Edwin Larson, State Fire Marshal:*

The provisions with respect to the bond and insurance coverage mentioned in the questions are found in section 3 of said chapter 24302. In instances in this opinion where such insurance coverage is referred to as indemnifying persons against loss or damage, or words of similar import, such expressions are to be construed as meaning liability coverage of an insured with respect to claims for such loss or damage. After considering the provisions of section 3 and the apparent purpose of said chapter, in my opinion the questions are answered in their numbered order as follows:

(1) A part of said section 3 dealing with and describing said \$25,000 bond required of a licensee provides, "that the aggregate liability of the surety to all persons shall in no event exceed the sum of said bond." Such words are construed to mean that the total liability of the surety on said bond for damages or injuries of one or more persons recoverable under said bond shall not exceed \$25,000. If insurance is carried by the licensee in lieu of said bond, as contemplated by said section 3, the provisions of such section are satisfied if the liability coverage of the insured is not less than the indemnity features of said bond as construed.

(2) The bond required by said section 3 is "to indemnify and save harmless any and all persons from loss or damage by reason of the principal's failure to comply with such provisions, rules and regulations." This is construed to indemnify against personal injury or property damage. The provisions of this section permitting showing of insurance coverage in lieu of said bond do not specifically describe the nature of the risks insured against; and I do not construe the words, "policy of public liability or products liability insurance" in and of themselves as specifying the detailed nature of required coverage. Reference to the indemnity features of the bond required indicates the extent of insurance coverage necessary. Thus, whether such bond is given, or insurance carried in lieu thereof, the provisions of the act contemplate indemnifying against loss occasioned by personal injury and/or property damage.

(3) As indicated by the answer to question (2), a \$25,000 bodily injury policy alone is not acceptable in lieu of said bond.

(4) A general liability policy naming the insured's occupation but not specifically describing one or more of the businesses such insured may be licensed to engage in under chapter 24302, is acceptable in lieu of the required \$25,000, provided its coverage meets the requirements set forth

in the foregoing answers to the first and second questions. However, whether the insurance coverage required by said section 3 is provided by the provisions of such a policy as mentioned in the preceding sentence is at times uncertain; hence, to avoid uncertainty and to make sure that licensees under the act are properly insured, it is recommended that any such policy should include particular reference to the business or businesses of the licensee under chapter 24302 and with respect to which the bond or insurance coverage in lieu thereof, as prescribed by section 3 of the act, is required to be furnished by the licensee.

(5) Whether or not in the wording in section 3 of the act "that such applicant is carrying a policy of public liability 'or' products liability insurance with respect to such businesses," the quoted "or" was intended to be "and," would seem to be immaterial. The name of a particular policy offered by a licensee in lieu of bond as required by section 3 appears to be of no moment. If the policy or policies provide the coverage as explained in the answers to the first and second questions, such insurance is adequate.

### LIFE INSURANCE, GENERALLY

September 4, 1948.—048-292.

#### EMPLOYEE GROUP INSURANCE

QUESTIONS: (Four corporations are under a common ownership.)

1. May the employees of said four organizations be included in one group life insurance plan?

2. May the employees of said organization be included in one group insurance plan providing reimbursement for hospital room, board and other charges?

3. May the employees of said organizations be included in one group insurance plan providing reimbursement for surgical fees?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

In my opinion, the questions are answered in their numbered order as follows:

(1) It appears that group life insurance, as contemplated by this question, may be issued at a rate less than the usual premium rate for the same insurance coverage with respect to individual insureds, under the circumstances and conditions set forth in section 635.05 (3), Florida Statutes, 1941, as amended. This permits a group of employees of not less than twenty-five ("of any employer") to obtain such insurance. Since the wording quoted appears to be restricted to a single employer of the employees involved, and not to contemplate more than a single employer, this question is answered in the negative.

(2) and (3). The insurance apparently contemplated in these questions falls within accident and sickness insurance, the subject matter of chapter 24087, Laws of Florida, acts of 1947, and particularly that kind of group coverage described in section 4B or 4C of said chapter. Either type of group insurance would seem to be limited to the employees of a single "corporation, co-partnership or individual" employer. Hence, these questions are answered in the negative.

December 15, 1948.—048-356.

#### ASSESSMENT LEGAL RESERVE LIFE INSURANCE COMPANY— FOREIGN CORPORATION—FLORIDA BUSINESS

QUESTION: Is an assessment legal reserve life company organized in pursuance of, and as contemplated by, article XVI, Illinois Insurance

Code, 1943 (chapter 73, sections 866-893, Illinois Revised Statutes, 1947), such an assessment company as is prohibited from transacting business in the State of Florida, under the provisions of sections 635.22 or 640.30, Florida Statutes, 1941, as amended?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

At the outset, it is stated that no time has been spent examining the policy forms used by this company in the transaction of its business and, hence, the opinion expressed herein is not to be construed as an approval of such forms. Insofar as this question is concerned, it would seem that the answer is to be derived from an examination of the Illinois laws under which this company was organized and exists. It is further pointed out that this opinion is limited to the matter set forth in the question and does not deal otherwise with the qualifications of this company to be admitted to engage in business in this state.

From certified copy of report of an examination of this company, dated February 20, 1948, by the Insurance Department of Illinois, now on file in the office of the Insurance Commissioner of Florida, it appears that this company is authorized to write life insurance and accident and health insurance as provided in, and contemplated by, the foregoing applicable laws. Such companies are required to maintain reserves (sections 278 and 281, Illinois Insurance Code), but are not required to provide in their policies for loan and non-forfeiture values (section 281(c), Illinois Insurance Code). However, it appears from an excerpt (uncertified) of the minutes of the board of directors of said company, it was provided that on and after April 15, 1947, the company would comply with provisions of the Illinois Code pertaining to non-forfeiture provisions. Thus, apparently, there is contemplated life policies with legal reserve and non-forfeiture provisions.

Section 275, Illinois Code, requires that life contracts issued by such companies shall provide, in addition to regular contributions, for the payment currently of additional contributions, upon required notice, to the extent needed for claims, expenses and maintenance of the tabular reserves required for said companies.

Section 635.22, Florida Statutes, 1941, as amended, provides that no life insurance company or association, other than fraternal benefit societies, which issues contracts, the performance of which is contingent upon the payment of assessments or calls made upon its members, shall be organized to do business within this state; with a proviso that all such companies or associations "licensed to do business within the state" at the time of the passage of this law might continue in such business.

Section 640.30, Florida Statutes, 1941, as amended, provides that from and after May 26, 1947, no new certificates shall be issued under the provisions of chapter 640, Florida Statutes, 1941, to any domestic or foreign benevolent mutual benefit association or society.

Chapter 640, Florida Statutes, 1941, provides for the organization and management of benevolent mutual benefit societies. A fair reading of the law indicates that the deposit (section 640.09) and guaranty reserve fund (section 640.10) was in no sense a legal reserve; that no other provisions of said chapter contemplated the establishment of such a reserve; that there was no provision for non-forfeiture or cash surrender values. Section 640.23, Florida Statutes, 1941, provided that no foreign mutual benefit association should be admitted to transact business in this state until it had complied with the provisions of said chapter 640.

In view of the foregoing, in my opinion the question is properly answered as follows:

Section 635.22, Florida Statutes, 1941, by its wording refers to companies or associations "organized" to do business within this state, hence apparently it has no application to this foreign corporation. This foreign

assessment legal reserve company appears not to be a benevolent mutual benefit association as contemplated by chapter 640, Florida Statutes, 1941. This being true, sections 640.23 and 640.30, Florida Statutes, 1941, do not apply to it. It appears that an assessment legal reserve life company as described in the above question, is not such an assessment company as is contemplated by sections 635.22 or 640.30, Florida Statutes, 1941, as amended; hence the question is answered in the affirmative.

The above mentioned excerpt from copy of directors minutes of said company in its present uncertified state should not be accepted as proof of the matter sought to be evidenced thereby. Furthermore, as pointed out, the question of whether this company is otherwise qualified under Florida laws is not here dealt with.

December 13, 1948.—048-357.

**GROUP LIFE INSURANCE—COUNTY BAR ASSOCIATION—  
GROUP HEALTH AND ACCIDENT INSURANCE**

**QUESTIONS:** 1. May an insurance company lawfully issue group life insurance to the members of a county bar association, or any other association in which there is no employer-employee relationship?

2. May an insurance company lawfully issue group accident and health insurance to the members of such an association?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The questions are answered in their numbered order as follows:

(1) It is assumed that this question contemplates life insurance coverage to be issued at a premium rate less than the rate required for life coverage under a policy issued to a single individual. It would seem that such group insurance issued at rates less than the usual rates of premium is permitted only in connection with insuring employees of any employer who, through their secretary or employer, take out insurance in groups of not less than 25 persons and pay their premiums through such secretary or employer. See section 635.05 (3), Florida Statutes, 1941, as amended. Hence, it appears that qualifying this question by the assumption set forth in the first sentence of this answer, the question is answered in the negative.

(2) Section 642.04 (2), Florida Statutes, 1941, as amended, provides for "group accident and sickness insurance" for members of bona fide associations under the circumstances and as contemplated by said provision of law. Hence, an insurance company lawfully may issue group accident and sickness insurance to the members of such associations under the circumstances and as provided in said provision of law concerning such associations and the members thereof.

In this connection, attention is further directed to "franchise accident and sickness insurance" as provided by section 642.04 (3)(b), Florida Statutes, 1941, as amended, in instances of trade and professional associations, labor unions, or any other associations having had an active existence for at least two years and which associations and the members thereof meet the conditions and requirements of this particular provision of law.

**FRATERNAL BENEFIT SOCIETIES**

August 3, 1948.—048-257.

**POLICE AND FIREMEN'S INSURANCE—EXEMPTION  
OF FOREIGN ASSOCIATION**

**QUESTION:** A foreign association apparently operating under the laws of its home state governing fraternal benefit societies, under its Arti-



cles of Association, as amended, limits its membership to paid police and firemen and, as a part of its object, insures such members against injury occasioned by accident and sickness or other casualty, and provides for payment of a stipulated amount to the proper beneficiary named in its policy or certificates. Is this organization included in those which are exempt under the provisions of section 637.59, Florida Statutes, 1941?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 637, Florida Statutes, 1941, as amended, pertains to fraternal benefit societies. Section 637.59 provides, in part, that nothing contained in such chapter "shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance department of Masons, Odd Fellows or Knights of Pythias, should such societies have insurance departments connected therewith), or societies which limit their membership to any one hazardous occupation, not to similar societies which do not issue insurance certificates."

The object of this association appears to be set forth in article III, Amended Articles of Association, filed in the office of the Secretary of State of Indiana on November 4, 1918:

"The object of this Association shall be to create and operate a Supreme Lodge and Subordinate Branches for the purpose of inculcating principles of friendship and brotherhood among Paid Police and Firemen and for the Mutual Protection and Relief of its members and their families, and to insure them against injury occasioned by accident and sickness or other casualty, and to pay a stipulated amount to the proper beneficiary named in its policy or certificates, at the death of a member, all of which shall be in accord with its By-Laws, Rules and Regulations, and the Laws of Indiana."

In view of the foregoing, in my opinion the question is answered as follows:

The answer is limited to the specific question, *supra*.

The few cases apparently available on the question of whether or not a police officer is engaged in a hazardous occupation, appear to depend upon the specific wording of statutes of other states involved in the cases mentioned (*City of Duncan v. Ray*, 23 P. 2d 694, 104 Okla. 205; *Brigham v. Allegheny County*, 33 N. Y. S. 2d 479, 263 App. Div. 468; *Aleksich v. Industrial Accident Fund*, 151 P. 2d 1016, 116 Mont. 127.) While no extended search has been made, no cases dealing with the question as related to firemen have been found. Neither of these is included in the hazardous occupations contemplated by chapter 769, Florida Statutes, 1941. It would appear that reasonably each of these occupations is a "hazardous" one within the meaning of section 637.59. However, the exemption in that section applies to societies limiting their membership to one hazardous occupation; here, two distinct types of occupations are under consideration. Furthermore, here is found an association engaging "to insure" its members and issuing "a policy or certificates." For the foregoing reasons, it appears that this organization does not fall within those described as exempt in section 637.59; hence, the question is answered in the negative.

## SICK AND FUNERAL BENEFIT INSURANCE

May 6, 1948.—048-149.

### LIMITATION—AMOUNT OF POLICIES

QUESTION: Are the limitations in section 638.05, Florida Statutes, 1941, concerning maximum benefits for risks as therein set forth, to be construed as applicable to sick benefits as well as death benefits?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Said section 638.05 provides that an insurer qualified and authorized to do a sick and funeral benefit insurance business under chapter 638, Florida Statutes, 1941, "which has twenty-five thousand dollars paid up capital, may issue or assume on any one risk, life policy, agreement or contract, death benefits not exceeding two hundred fifty dollars and if said insurer has fifty thousand dollars paid up capital it may issue or assume on any one risk, life policy, agreement or contract, death benefits not exceeding five hundred dollars."

The foregoing must be read in the light of chapter 23671, Laws of Florida, acts of 1947, increasing the required amount of capital stock of an insurer contemplated thereby to the minimum of \$50,000, granting to such insurers then qualified to July 1, 1948, to comply with such requirement.

Attention is also directed to chapter 24087, Laws of Florida, acts of 1947, which relates to accident and sickness insurance, and to section 38 of such chapter providing that policy for such insurance may contain the provision for paying benefit for death from any cause in an amount not exceeding \$250. In an opinion of this office to the insurance commissioner on July 7, 1944, No. 044-183, it was held, in effect, that under section 625.01 (8), health and accident insurance is "sick and funeral benefit insurance."

In view of the foregoing, in my opinion the question posed is properly answered as follows:

The noted limitations in said section 638.05, concerning the maximum benefits for risks, as therein set forth, are to be construed as applicable only to "death benefits" as distinguished from sick benefits. While possibly not of moment to this opinion, attention is directed to the fact that such section 638.05 should be read in the light of said chapters 23671 and 24087.

February 13, 1948.—048-54.

#### INVESTMENT OF CAPITAL IN REAL PROPERTY

**QUESTION:** May a domestic sick and funeral benefit insurance company, as contemplated by chapter 638, Florida Statutes, 1941, as amended, capitalized at \$50,000, of which not less than \$25,000 is invested in U. S. Government bonds, invest any portion of the remainder of its capital in improved real property not used and occupied by such insurer in connection with its business?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The request for opinion states that this particular company has suffered an impairment in its paid up capital, and that one of the stockholders has deeded to the company certain improved real estate which is not intended to be used in connection with the operation of the company, with a view of reducing such impairment in capital by the value of the real estate. The foregoing question is asked, "assuming the title and valuation to be satisfactory." The request for opinion further states that the company has on deposit with the insurance commissioner \$25,000 in U. S. Government bonds, and it is assumed that the amount thereof represents an investment of a portion of the capital of such insurer. It is further assumed that the real estate mentioned has been deeded unconditionally to the insurer. This opinion is conditioned upon said several assumptions.

Section 638.02 requires at this time that the amount of the capital of said company shall be not less than \$25,000. Section 638.03 requires such a company to have deposited with the insurance commissioner \$25,000 in cash or, among other described securities, U. S. Government bonds.

Section 638.07 provides that before the insurance commissioner shall issue to such company a certificate of authority or annual renewal thereof, he shall be satisfied that such insurer "is possessed of in cash or has actually invested at least twenty-five thousand dollars in mortgages or unencumbered improved real estate in this state worth double the amount loaned thereon, exclusive of buildings thereon, or in United States, state, county or municipal bonds at their market value or twelve thousand five hundred dollars invested as above provided and twelve thousand five hundred dollars or more invested in improved real estate used and occupied by such insurer in connection with its business." The quoted word "or" is obviously a typographical error and is to be construed as "on" (see section 3, chapter 5459, Laws of Florida, acts of 1905). The quoted word "exclusive" appears as "inclusive" in section 4302, Revised General Statutes, 1920; but the question here does not appear to require a discussion of such difference.

Section 638.04 requires such an insurer to maintain a reserve for the protection of policyholders, the details of which are set forth in said section. Section 3, chapter 9149, Laws of Florida, acts of 1923, with respect to reserve, provided that the \$5,000 deposit then required to be made with the insurance commissioner, "may be included as a part of such reserve." It will be noted that this opinion does not purport to deal with the character of such reserve, and that it is assumed that the deposit with the insurance commissioner represents capital investment.

Section 638.05 provides that if the company's paid up capital is \$25,000, benefits payable as to a single risk shall not exceed \$250, but if such paid up capital is \$50,000 such benefits as to any one risk are permitted up to \$500.

Chapter 23671, Laws of Florida, acts of 1947, amended section 638.02 to require that, by July 1, 1948, the paid-in capital stock of any such insurer shall be not less than \$50,000.

A study of the history of the legislation concerning insurers of this type, beginning with chapter 5459, Laws of Florida, acts of 1905, down to the present provisions of chapter 638, Florida Statutes, 1941, as amended, would seem reasonably to indicate that as to such an insurer capitalized at \$50,000 there is no legislative authority for investment of any part of the paid-in capital in improved real property of the character contemplated by the question.

In view of the foregoing, in my opinion the question is answered as follows:

The supervision of insurance companies operating in this state is lodged in the insurance commissioner in the interest of public welfare, particularly in the interest of policyholders of insurers. While doubt exists that any part of the \$50,000 capital of the insurer here involved may be invested in improved real property "not used and occupied by such insurer in connection with its business," if the insurance commissioner, considers that the welfare of this insurer's policyholders will be served by temporarily permitting the insurer to hold such real property as a part of its capital assets, he would appear justified in doing so, subject to conversion by the insurer of such real property into one of the types of assets permitted by and specified in section 638.07 within such reasonable time as may be determined by the insurance commissioner. In view of the provisions of the aforesaid chapter 23671, by July 1, 1948, this insurer should have paid in capital of \$50,000 in cash or represented by assets of the kind described in and permitted by section 638.07.

May 2, 1947.—047-129.

#### VOLUNTARY DEPOSIT—RETURN OF PORTION

QUESTION: An insurance company organized under the laws of Florida and authorized to engage in the sick and funeral benefit insurance

business in this state as contemplated by chapter 638, Florida Statutes, 1941, voluntarily deposited with the insurance commissioner in the year 1937 certain notes secured by mortgages, in the aggregate face amount of \$144,000. The company at that time had on deposit with the commissioner a regular statutory deposit of \$31,000 in cash and bonds, and the company at this time has increased such deposit to \$71,745 in bonds. The company has requested return to it of the several items composing such voluntary deposit made by it. May such deposit be returned to the company by the commissioner without the requirement that there be made dollar for dollar replacement with other securities?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

This is the third opinion written by the attorney general's office with respect to this voluntary deposit. The first, written October 29, 1943 (No. 043-289), concluded that as an attempt to make the voluntary deposit permitted by section 635.11, Florida Statutes, 1941, the securities were inadequate and could not be accepted by the commissioner under said section. The second opinion, written August 19, 1946 (No. 046-354) accepted the factual situation set forth in the request therefor and treated this voluntary deposit as a part of the entire deposit of this insurer under said section 635.11. Now it would appear from the letter of the company to the insurance commissioner of March 6, 1947, that the deposit in question was not made in pursuance of said section 635.11 and that the same was entirely voluntary; and as such a voluntary deposit, the company has requested it be returned to it.

A description of the notes and mortgages composing this voluntary deposit is set forth in said opinion No. 043-289, to which it appears, should be added an additional note and mortgage, dated December 1, 1937, executed by Wilson Funeral Homes, Incorporated, to H. A. Wilson, in the amount of \$10,000, which does not appear to be included in those appearing in said opinion.

The various instruments whereby the items composing such deposit became the property of this insurer and whereby the same were assigned to the insurance commissioner have not been furnished this office. For the purpose of this opinion, and in the absence of any showing to the contrary, it is assumed that the company has such title thereto as to authorize it to assign the same. Furthermore, for the purpose of this opinion, there is accepted the statement in the letter from the insurance commissioner of February 3, 1947, that the assignment of such notes and mortgages to the insurance commissioner was made "voluntarily by the company as further and additional security for the benefit of its policyholders."

If this was not an attempt to make a voluntary deposit as permitted by said section 635.11, then it must occupy the status of a voluntary deposit dissociated from the authority or requirement of any statute. And it is here remarked that if at the time the deposit was made this insurer was not authorized to engage in the life insurance business, as distinguished from the sick and funeral benefit insurance business, it is doubtful that there was authority for any attempt to meet the requirements of said section 635.11.

In at least two cases, courts in other states have held that a deposit voluntarily made by an insurance company and not in pursuance of any statute, created a trust for the benefit of policyholders. (See *State v. American Bonding & Casualty Co. (Ia.)*, 221 N.W. 585, and *Boston & Albany R. Co. v. Mercantile Trust Co. (Md.)*, 34 A. 778.) In the former of these two cases, on the question of the right of the insurance commissioner to be designated and act as trustee of such a trust, the court stated, in effect and in part, that if a trust was created by the company by act of the company, it would not be defeated because of inability or want of authority on the part of the trustee, and that a court of equity will not permit a trust to fail for want of a trustee. In the other of these cases,



the court stated, in part and in effect, that it was not necessary to consider whether the deposit of the company was made under the impression that it was required by statute, or whether it was made voluntarily with a view to strengthen the credit of the company and to give confidence to its policyholders; the fact was that the company did make the deposit. Whether or not the facts in the instant case approximate the legal situation found in these two cited cases, and, if so, whether or not the rule announced in such cases would be the rule here, are questions which only the courts can decide.

In view of the foregoing, the questions are properly answered as follows:

1. If such voluntary deposit of this insurance company was made in an attempt to make the permissive deposit contemplated by section 635.11, Florida Statutes, 1941, it is insufficient, and the ruling of the foregoing opinion No. 043-289 that the commissioner may not accept such deposit under said section is controlling here and answers the question.

2. If such voluntary deposit was made by the insurer, dissociated from any statutory requirement or permission, and was made as further and additional security for the benefit of its policyholders, since it is not possible to state with certainty whether or not such a trust was created for the benefit of policyholders as would be recognized by the courts, I hesitate to advise that any such voluntary deposit may be released short of substitution of other securities therefor, dollar for dollar in value.

Certainly, if under the law this insurer is entitled to return of this deposit, it should be returned. If, on the other hand, a trust which the court would recognize has been created, it should not be returned; and it is here remarked that no legislation at this time could possibly affect such a trust, if the same exists. The actual facts in detail concerning the circumstances of the making of this deposit in all likelihood are obtainable, without controversy, from correspondence and from the wordings of the assignments. If such facts can be agreed to without controversy, it is suggested that the status of this voluntary deposit can be speedily determined by mandamus proceedings in the supreme court to coerce the insurance commissioner to return the deposit.

February 8, 1947.—047-44.

#### UNDERTAKER AS AGENT—PREMIUM COLLECTION

QUESTION: In September, 1945, a contract was entered into between an insurance company and an undertaker which provides, in part, "that (the undertaker) should have the exclusive right and authority to solicit and write all insurance or policies written by said insurance company on the negro race living in (the undertaker's county)." The contract runs for ten years from date. The insurance commissioner has refused to license this undertaker as an agent for said company on the ground that such is prohibited by section 638.16, Florida Statutes, 1941, as amended, and has instructed the company to sever connections with said undertaker. The undertaker is demanding that the company adhere to its contract. 1. Can such contract be enforced?

2. Was said contract valid when it was entered into by said parties?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

In view of the stated reason for refusing to license this undertaker, it is assumed that the insurance contemplated by this contract was sick and funeral benefit insurance.

I hesitate to pass upon the validity of this contract in the absence of having the entire document available for study. Furthermore, a consideration of the entire contract would be necessary to ascertain if the provisions

thereof were so related to the duties of insurance commissioner as to warrant an opinion with respect thereto by this office. Hence, I must respectfully refuse to answer the two questions.

Since it appears, however, that the refusal to license the undertaker is related to the matters set forth in the foregoing statement, it would seem helpful to propound and discuss a third question, to wit:

To what extent do the provisions of said section 638.16 prohibit an insurer engaged in the sick and funeral benefit insurance business from permitting an undertaker to act as its agent?

Said section 638.16 makes it unlawful for any insurer doing business in Florida to permit any funeral director or undertaker to act as its agent in collecting premiums from holders of sick and funeral benefit insurance policies issued by such insurer.

It is a well recognized general principle of law that, save as restricted by valid legislation, every person has the right to work in any lawful field of endeavor. Such principle comes from the common law and would seem to derive from the long prevailing occidental legal and religious concept of the dignity of man, the reasonable demands of his nature and his inherent prerogatives. Police regulations which condition or limit such elementary right are subject to strict construction.

The collection of insurance premiums is not the only activity of an insurance agent. Such activity, and others, are contemplated by sections 625.01(1), Florida Statutes, 1941, among which are those of soliciting and delivering policies of insurance for the insurer represented.

In view of the foregoing remarks, in my opinion the third question is answered as follows:

The provisions of said section 638.16 do not prohibit an insurer engaged in the sick and funeral benefit insurance business from permitting an undertaker to act as its agent with respect to those functions and activities of an insurance agent contemplated by said section 625.01(1), with the exception of the one activity of collecting premiums from the holders of such insurer's sick and funeral benefit policies.

## BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

May 18, 1948.—048-179.

### REINSURANCE CONTRACT—PRO RATA SHARE GUARANTY RESERVE FUND

**QUESTIONS:** (For detailed facts involved in the questions below, refer to my opinion No. 048-109.) 1. Was the payment by the insurance commissioner of \$16,829.88 in market value of bonds to the Texas company to apply on death claims accrued against American Benefit Company and assumed by the Texas company in the contract of reinsurance, in keeping with such contract, the decree of the circuit court of Orange county approving such contract, and the exercise of the insurance commissioner of his discretion in approving the contract?

2. Will the insurance commissioner be justified, in keeping with the terms of said contract and said decree of the court, in now paying over to the Texas company the pro rata part of the guaranty reserve fund applicable to each of the death claims paid and/or assumed by the Texas company?

3. Will the insurance commissioner be justified under said contract and decree of the court in now paying to the Texas company the pro rata interests of each of the former certificate holders of the Florida company who accepted reinsurance contracts with the Texas company?

4. What disposition should the insurance commissioner make of the pro rata interest of each of the members of the assessment group who do not accept their pro rata share of the guaranty reserve fund, do not convert, and do not accept reinsurance, as contemplated by chapter 23961, Laws of Florida, acts of 1947?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The Texas company, by its contract of reinsurance, appears to have assumed the payment of death claims accrued against the Florida company on matured assessment certificates at the date of execution of the contract. It appears from a letter from the chairman of the Texas Board of Insurance Commissioners and from Mr. Joe L. Schmitt, Jr., Examiner, Arizona Insurance Department, that claims thus assumed amounted to \$44,706; that the Texas company has to this date paid \$35,290.45 of such claims; that the insurance commissioner of Florida heretofore paid to the Texas company from said guaranty reserve fund bonds of the value of \$16,829.88; that the Texas company has paid out on such claims \$18,440.57 more than it has received from said guaranty reserve fund; that funds contributed by Texas, Arizona and other policy holders of the Texas company have been used to pay claims so assumed by the Texas company; that unless the pro rata part of said guaranty reserve fund is paid by the commissioner to the Texas company by May 15, 1948, the Texas commissioners will order the Texas company to cease paying claims of the reinsured American Benefit group until such time as said funds are delivered. It will be observed that apparently no notice was given by the gentleman who wrote the aforementioned letter to the sum of money delivered by the Florida company to the Texas company at or soon after the execution of said contract, which sum, I am informed by the commissioner's office, amounted to approximately \$18,000 according to the Florida company, several thousand dollars less according to the Texas company.

As to possible constitutional, and other, questions involved with respect to this transaction and left in an uncertain state by the Orange county circuit court, I do not recede from aforesaid opinion No. 048-109. It is recognized that such questions are apparently foreclosed as to those former certificate holders of American Benefit Company who converted, accepted reinsurance or elected to take their pro rata part of said guaranty reserve fund. Those who possibly might raise such questions appear to be limited to the following classes: (1) holders of valid certificates at the time such transaction was entered into and who have made no election under chapter 23961 affecting the guaranty reserve fund; (2) judgment creditors of American Benefit Company with recourse against the guaranty reserve fund, as contemplated by section 640.12, Florida Statutes, 1941; and (3) claimants under certificates with respect to which holders ceased paying assessments after American Benefit Company discontinued issuing assessment certificates. It is recognized that the chance of a valid claim being asserted by any of such class is not probable, yet possible.

It will be noted that, in effect, the wording of the foregoing questions is conditioned upon the validity of the mentioned reinsurance contract and decree; and the questions are answered here in their numbered order, subject to that condition and my former opinion No. 048-109.

(1), (2) and (3). The decree of the circuit court of Orange county, Florida, the reinsurance contract and the reinsurance certificate seem reasonably to lead to the conclusion, under the statement of facts assumed in former opinion 048-109, that the insurance commissioner of Florida should deliver to the Texas company the balance of the pro rata part of the guaranty reserve fund, originally of American Benefit Company, allocable under chapter 23961 to those former certificate holders of the Florida company who accepted reinsurance with the Texas company.

While the reinsurance contract contemplates the assumption by the Texas company of certain death claims of the Florida company accrued at

the time of the execution of the contract, grave doubt exists under chapter 23961 of the legal authority to include such assumption in the reinsurance contract. The wording in the second question, supra, "the pro rata part of the guaranty reserve fund applicable to each of the death claims," appears to assume that which does not exist, since the pro-rata of the guaranty reserve fund has not taken death claims into account, as I understand it. The contract provides that the pro rata part of the guaranty reserve fund allocable to those reinsuring with the Texas company should be "disbursed by the company in accordance with the laws of the State of Texas for the payment of valid death claims of the assessment group of the association which are assumed hereunder and valid death claims arising under policies issued or assumed by the company." (It is assumed that the word "issued" is surplusage.) This provision in the contract apparently results in the burden of all accrued death claims being thrust upon the pro rata part of the guaranty reserve fund allocable to the reinsured group, and not being visited upon the group who converted or elected to take their pro rata part of said fund. In the absence of a court decision upon this point, no definite statement can be made; however, it would seem reasonable to assume that the acceptance of reinsurance by the individuals composing the reinsured group constituted their acquiescence in the use of their pro rata share of the guaranty reserve fund by the Texas company, as in the reinsurance contract provided. Furthermore, it will be noted that these reinsureds by the reinsurance certificate and contract of reinsurance transferred to the Texas company their interest in such fund.

Hence, it would seem that (1) the payment of \$16,829.88 market value of bonds from the guaranty reserve fund by the commissioner to the Texas company for application on such death claims assumed by said company was in pursuance of the reinsurance contract, which contract feature, for the reasons stated, probably has been acquiesced in by the reinsureds; and payment of an additional part of the pro rata amount of said fund allocable to the reinsureds for application on death claims assumed and/or paid by the Texas company is subject to the same comment as that directed to the amount heretofore delivered; and (2) under said contract and decree of the court the insurance commissioner will be justified in now paying to the Texas company the unpaid balance of the pro rata part of said fund allocable to such reinsureds as contemplated by chapter 23961.

(4) The pro rata part of those certificate holders in the guaranty reserve fund who have not converted, have not accepted their pro rata share or elected to accept such share in said fund, and who have not accepted reinsurance, is required by chapter 23961 to remain on deposit with the insurance commissioner, subject to such disposition as set forth in said law. Particular attention is directed to the provision in paragraph 3 of the contract which provides, among other things, that receipt by the insured or legal holder of any policy or certificate of the Florida company of the Texas company's reinsurance certificate shall be deemed acceptance of such certificate, unless such insured shall within sixty days after date on which such certificate is mailed, return same, together with his certificate or policy, to the Florida insurance commissioner, together with written notice of refusal to accept such certificate and his election to retain his right, title and interest in the guaranty reserve fund. I do not consider that the failure of such an insured or holder to do the things so required in said contract places him in the class of those reinsured by the Texas company; rather, such a holder or insured remaining silent shall be placed in the class contemplated by this question.

In conclusion, and with respect to all comments and answers concerning the foregoing questions, it is observed that the same contentions pertaining to possible irregularity of disbursement of the guaranty reserve fund by the insurance commissioner as contemplated by said chapter 23961 which might be urged now, existed at the time of the approval of the rein-



surance contract by the commissioner. At the time he approved such contract, in excess of 3,000 former certificate holders of the Florida company accepted reinsurance with the Texas company. By his approval of said contract, the commissioner in effect, elected to ignore or assume the possible risks aforementioned, attendant upon disbursement of the guaranty reserve fund under chapter 23961; and he is confronted with the grave issue of whether he should now question his former acts when such might occasion possible serious detriment to those who accepted reinsurance with the Texas company. In my opinion, the commissioner, having elected to assume the aforesaid risks at the time of his approval of said contract, should not recede at this time from the position then assumed. In the event the commissioner should elect to require further court proceedings involving his duties under said court decree, contract and/or chapter 23961, in view of all the circumstances and contract rights accrued in reliance upon former official acts of the commissioner, this office would be forced to decline to participate in proceedings which would involve questioning such court order and prior official acts.

(See opinion No. 048-109.)

March 29, 1948.—048-109.

#### GUARANTY RESERVE FUND—WITHDRAWAL—PRORATING

QUESTION: Under the provisions of contract of reinsurance dated September 8, 1947, between Midwest Life Insurance Company (Texas company), and American Benefit Company (Florida company), is the insurance commissioner of Florida required to deliver to the Texas company upon its demand therefor the pro rata interest in the guaranty reserve fund of the Florida company of those persons who have accepted reinsurance with the Texas company, such pro rata interest being determined in the manner provided by chapter 23961, Laws of Florida, acts of 1947?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The question involves the withdrawing and prorating of the guaranty reserve fund, originally the fund of the Florida company with the insurance commissioner, in pursuance of such reinsurance contract and said chapter 23961. The reinsurance contract refers to the "guaranty deposit" and "guaranty reserve" funds. Chapter 23961 refers to the "guaranty reserve fund." I construe the last-quoted words as including the \$25,000 deposit required by section 640.08, Florida Statutes, 1941, and additions thereto from the source provided in section 640.09, Florida Statutes, 1941. The request for opinion states that in October, 1947, bonds of the market value of \$16,829.88, constituting a part of said fund, were turned over to the Texas company for application to payment of claims assumed by said company and incurred by the Florida company on certificates prior to the date of said contract. As to regularity of the delivery of said bonds I do not comment or venture any opinion.

I have been orally informed by a representative of the insurance commissioner's office that at least 75 per cent of the former certificate holders of the Florida company have either accepted reinsurance with the Texas company, or have converted their certificate into legal reserve or level premium policies with the Florida company, or have accepted refund of their pro rata part of the guaranty reserve fund of the Florida company.

It appears that on October 7, 1947, in proceedings for declaratory decree in the Circuit Court of Orange County, Florida, wherein J. Edwin Larson, as Insurance Commissioner of the State of Florida, was plaintiff, and American Benefit Company, a Florida corporation, was defendant, final decree was entered by the court providing the following:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED That the Insurance Commissioner of the State of Florida

has the power and authority to approve the plan and the proposed Reinsurance Agreement in his own discretion, and upon such approval has the power and authority to disburse the Guaranty Reserve Fund in conformity with his findings and this Decree under the terms and provisions of the said Chapter 23961, Laws of Florida, 1947."

It will be noted that there were involved in said proceedings one or more constitutional questions, and it is remarked that this office had no knowledge of the pendency of such proceedings until after the entry of said final decree.

An inquiry into the duty of the insurance commissioner pertaining to the matter expressed in the question reasonably would require a consideration of the Florida company as originally organized and operating under chapter 640, Florida Statutes, 1941; the action of said company under chapter 22539, acts of 1945, in its conversion to a legal reserve or level premium company in relation to certificate holders who failed or refused to convert; whether or not all the assessment members of the Florida company were bound by the action of said company in the execution of said contract and by said declaratory decree; the provisions of chapter 23961; the effect of said proceedings for declaratory decree; and the efficacy of said contract. This office was not consulted concerning the regularity or validity of said transactions, proceedings, law and contract. I am confronted, however, with the executed contract, and the rights thereunder of several thousand former certificate holders of the Florida company who accepted reinsurance in pursuance thereof, as accomplished facts, and the duty of the insurance commissioner in relation to the disposition of property of considerable value. Regardless of what may have preceded the execution of the contract, it is to be distinctly understood that this opinion is conditioned solely upon the assumption of its validity. Furthermore, this opinion does not deal with the merit of possible claims of persons under certificates of the Florida company who have not consented to any of the transactions or proceedings mentioned; and in that respect the opinion is further conditioned.

The question dealt with on that basis requires consideration of chapter 23961, the reinsurance contract, the reinsurance certificate under which the Texas company reinsured former certificate holders of the Florida company, and the final decree entered in said proceedings for declaratory decree.

In view of the foregoing, and conditioned as set forth herein, it is my opinion that the question is properly answered as follows:

It appears that the insurance commissioner, agreeable to the aforementioned decree, on October 7, 1947, approved the plan and reinsurance agreement, between the Texas company and the Florida company. The court in said decree instructed the commissioner concerning his handling and disposition of the pro rata part of said guaranty reserve fund of those certificate holders of the Florida company who accepted reinsurance with the Texas company; that is to say, the court in said decree instructed the commissioner that he had the power and authority to disburse the guaranty reserve fund "in conformity with his findings and this Decree under the terms and provisions of the said chapter 23961, Laws of Florida, 1947." This instruction of the court appears to be clear and explicit, and appropriately this office may not elaborate thereon or modify any feature thereof.

The purpose of the request for opinion is for the protection of the insurance commissioner in respect to his duty in relation to this demanded prorating of the guaranty reserve fund; yet no opinion of this office can assure the protective finality sought by the commissioner. Hence, if the commissioner is doubtful of his duties under the aforesaid instruction of the court because of the wording of said decree, or if circumstances have arisen subsequent to the entry of said decree which have raised doubts in the mind of the commissioner concerning his duties under said decree, in

view of the rather grave responsibility here presented, it would seem that ordinary caution dictates the advisability of the commissioner's attempting to obtain further instruction from a proper court in appropriate proceedings instituted for such purpose.

### HOSPITAL SERVICE PLANS

April 22, 1947.—047-116.

#### OSTEOPATHS—PROFESSIONAL SERVICES

**QUESTION:** Are the professional services of osteopaths and a hospital, owned and operated by osteopaths, included in "medical and/or surgical and/or hospital service plan or plans" as such plan or plans are provided for and contemplated by chapter 641, Florida Statutes, 1941, as amended?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Any five or more persons may form a corporation for the purpose of establishing, maintaining and operating a non-profit medical and/or surgical and/or hospital service plan or plans whereby medical and/or surgical and/or hospital service or care may be provided in whole or in part by said corporation, or by physicians and/or surgeons and/or hospitals participating in such service plan or plans to such of the general public as become subscribers thereto, in the manner and as provided in said chapter 641.

The words "medical and/or surgical and/or hospital service plan or plans," without further definition or qualification reasonably include medical and surgical services of osteopaths and hospitals operated by osteopaths. Apparently the only provision in this chapter which bears upon the coverage of any of such quoted words is found in the last sentence of section 641.01(1), as follows: "The term 'medical and/or surgical service plan' as used in this law, includes the contracting for the payment of fees toward, or furnishing of, professional services authorized or permitted to be furnished by a duly licensed doctor of medicine." I do not construe the word "includes," in said quoted provision, as limiting any such medical and/or surgical service plan to services furnished by duly licensed doctors of medicine. Such a limitation might have been intended, but to give the quoted language its fair and unambiguous meaning in my judgment that is not the result.

In view of the foregoing, in my opinion the question is answered as follows:

The question is answered in the affirmative; that is to say, that the professional services of osteopaths and a hospital, owned and operated by osteopaths, are included in "medical and/or surgical and/or hospital service plan or plans" as such plan or plans are provided for and contemplated by chapter 641, Florida Statutes, 1941, as amended.

### SURETIES AND SURETY COMPANIES

August 4, 1948.—048-259.

#### SUPERSEDEAS BOND—LIABILITY OF COUNTY FOR PREMIUM

**QUESTION:** Under section 648.05, Florida Statutes, 1941, or other applicable law, is the County of Hillsborough responsible to a surety company for the premium on a supersedeas bond given for one convicted of a crime in the Criminal Court of Record of Hillsborough County where, on appeal to the Supreme Court of Florida, the conviction of said person was there reversed, the said company being surety on said bond?

*To Honorable C. M. Gay, State Comptroller:*

Section 648.05, Florida Statutes, 1941, could not be applicable as that section refers only to premiums paid for supersedeas bonds given by a fiduciary (*Hull v. Burr*, 57 So. 616).

I am not unmindful of the provisions of section 939.06, Florida Statutes, 1941, and article 16, paragraph 9, of the Florida Constitution, which requires the county to pay all legal costs, fees and expenses of a defendant who has been discharged or acquitted. However, I do not consider the premium for supersedeas bond for one convicted of a crime to be such legal costs, fees and expenses as are contemplated by said statute and constitution.

I, therefore, answer the question in the negative.

### LIMITED SURETY COMPANIES

August 24, 1948.—048-278.

#### CRIMINAL BAIL BONDS—FORFEITURE—INTEREST AND COSTS

QUESTION: A limited surety company executed as surety a criminal bail bond in the principal amount of \$500.00 under authority of section 649.10, Florida Statutes, 1941. The bond was forfeited and judgment was entered thereon by the circuit court pursuant to section 903.28, Florida Statutes, 1941, for the sum of \$500.00 plus \$12.68 interest and \$7.15 costs. Upon the company's failure to pay the judgment or to appeal from it within 30 days after entry, is the insurance commissioner of Florida authorized to retain, subject to the order of the circuit court entering said judgment, so much of the bonds or other securities deposited with him by said company as may be necessary to cover the interest and cost included in said judgment, as well as the principal amount thereof?

*To Honorable William A. Hallows, III, State Attorney:*

In my opinion, the judgment is unenforceable except for the principal amount thereof, i. e., \$500.00.

The judgment was not entered in a common law action in which costs follow the result of the suit and in which interest may be recovered. It was entered in a summary proceeding under section 903.28, Florida Statutes, 1941, which does not provide for an adversary action and does not require notice to be given to the surety. I think that the judgment is valid only to the extent that it is authorized by said section 903.28. Since the circuit court was proceeding under said statute, it had no jurisdiction to enter a judgment for any items not authorized by said statute. Said section 903.28, authorized the circuit court to enter judgment against the surety only "for the amount of the penalty of said undertaking," and authorized the issuance of execution "to collect the amount of said undertaking" only. Since the penalty or amount of the bond was \$500.00, the statute did not authorize the entry of judgment for any sum other than \$500.00.

It is true that section 649.15, Florida Statutes, 1941, provides that "Upon notice of failure to pay the amount of the final judgment as provided in this section, the insurance commissioner shall retain said bonds or other securities, or so much thereof as may be necessary to cover said judgment and costs, subject to the order of the court trying such suit that may be brought upon such bond or obligation." However, the costs that said provision authorizes the insurance commissioner to take into account are costs which are legally adjudged against a limited surety company, such as are imposed in a common law action, and not costs unauthorizably included in a judgment entered in a special statutory proceeding under a statute of which the terms do not allow for the recovery of costs.



It follows that, in my opinion, upon proper notice to the insurance commissioner pursuant to section 649.15, said commissioner has authority to hold, subject to the order of said circuit court, only so much of the bonds or other securities deposited with him by said company as may be necessary to cover the principal amount of said judgment, viz., \$500.00.

In view of the conclusion reached, it does not appear necessary to consider whether section 649.10, Florida Statutes, 1941, would operate to preclude the insurance commissioner from holding enough of the company's bonds or other securities to pay said interest and costs.

If the limited surety company involved is the same as the company dealt with in opinion No. 048-268 of August 11, 1948, nothing herein is to be construed as disturbing such previous opinion.

August 11, 1948.—048-268.

PAYMENT OF JUDGMENT—LIQUIDATING COMPANY—  
STATUTORY DEPOSIT

**QUESTION:** The financial condition of a limited surety company in this state has become such that the insurance commissioner has determined to bring proceedings, as prescribed by law, to take charge of and liquidate the same; and in pursuance of such determination has heretofore notified the president of said company, in pursuance of section 649.19, Florida Statutes, 1941, of the revocation of the company's certificate of authority, and has requested the attorney general to represent him in such proceedings. Heretofore, the insurance commissioner has received notices of certain unpaid judgments entered against said company, in pursuance of section 649.15, Florida Statutes, 1941. In view of the determination of the insurance commissioner to institute proceedings to take over and liquidate said company, as provided by law, should such official at this time dispose of sufficient of the company's securities on deposit with him to satisfy said judgments?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The question assumes, and this opinion is conditioned upon such assumption, that due notice and copies of court orders with respect to the judgments mentioned, as required by section 649.15, have been given to the insurance commissioner, but without assuming that such was done prior to the time said company ceased to be a going concern.

The request for opinion states that the company has failed to meet the requirement of chapter 24335, Laws of Florida, acts of 1947, to increase its deposit with the insurance commissioner from \$5,000 to \$25,000; and that the president of said company, on June 7, 1948, informed a representative of the commissioner that he had no intention of meeting such requirement, but intended to discontinue doing business.

The insurance commissioner, on July 15, 1948, addressed notice to the president of said company that, for the reasons therein stated and in pursuance of section 649.19, Florida Statute, 1941, the certificate of authority theretofore issued to said company had been revoked; which notice was served shortly thereafter on said corporate official by the sheriff of the proper county. Attention is further directed to said chapter 24335, which provides that upon failure of such a company to increase its aforesaid deposit from \$5,000 to \$25,000 by July 1, 1948, its certificate of authority should be cancelled without notice.

It may be that on the authority of Board of Public Instruction of Dade County v. Knott, etc., 106 Fla. 869, 143 So. 735, the aforesaid judgment creditors have prior claims to sufficient of the securities constituting this company's statutory deposit to cover the amount of the judgments involved. It might well be contended on the authority of that case that the

insurance commissioner should without delay dispose of sufficient of the securities constituting said deposit to pay the amounts of the judgments involved. However, the surety company here involved has ceased to be a going concern. Since this is true, it would seem proper that the commissioner retain undisturbed the entire deposit of this company in his hands. These judgment creditors will be afforded ample opportunity in such liquidation proceedings to assert such claims of priority as they may deem proper.

In view of the foregoing, in my opinion the question is properly answered as follows:

In view of the fact that this company has ceased to be a going concern, it is suggested that ordinary caution dictates that the insurance commissioner hold intact in his hands the deposit of this limited surety company; and that in the liquidation proceedings which are to be instituted concerning this company, proper court orders will control as to the disposition of the deposit and other possible assets of said company.

August 18, 1947.—047-258.

#### STATUTORY DEPOSIT—RELEASE OF DEPOSIT— PROCEDURE FOR RELEASE

**QUESTION:** Where section 649.06, Florida Statutes, 1941, was amended by chapters 24290 and 24335, Laws of Florida, acts of 1947, which acts became laws and took effect at the same time, how should the said amendments be construed?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Briefly, the provisions of original section 649.06, pertinent here, provided for the required statutory deposit of a limited surety company with the insurance commission, and the conditions under which said official might release such deposit when the company had ceased to do business, had settled up all claims chargeable against the deposit, and had been released of all bonds and undertakings. Chapter 24290 in amending section 649.06, made no change in the provisions of the original section other than to insert therein a proviso making reference to matters set forth in subsection (2) of the amended section; and said subsection added new matter dealing solely with the procedure to be followed by the insurance commissioner when request was made by a limited surety company for release of its statutory deposit. Chapter 24335 amended section 649.06 by raising the required amount of the market value of the statutory deposit from \$5,000 to \$25,000, the change being effective as in such chapter provided. Each of these chapters provided that section 649.06 is "amended to read as follows."

These chapters being in *pari materia* should be construed together if possible. Passed at the same session, such rule is invoked with added force; and having become laws on the same day, one will not be construed to have repealed the other in the absence of irreconcilable conflict. When a statute is amended "to read as follows," so much of the original act as is repeated without substantial change is not repealed, reenacted, or enacted anew, but is continued in full force from the date of its original enactment, and the new or changed provisions are effective from the time the amendment takes effect. And it is recognized that when acts passed at the same session contain conflicting clauses, the whole record of such legislation should be examined to ascertain legislative intent, and such, if ascertained, will control regardless even of priority of enactment. For authorities supporting one or others of the foregoing statements, see *Curry v. Lehman*, 55 Fla. 847, 47 So. 18; *Ex parte Perry*, 71 Fla. 250, 71 So. 174; *Amos v. Conkling*, 99 Fla. 206, 126 So. 283; *Milam v. Davis*, 99 Fla. 916, 123 So. 668; *Peoples v. Graves*, 204 Ill. 20, 136 N.E. 542; 59 C.J. 925, 928, 930, 1054, 1183.

In view of the foregoing, in my opinion, the question is properly answered as follows:

A study of the provisions of said chapters 24290 and 24335 in the light of the aforementioned authorities evidences that it was the legislative intent to amend said section 649.06, (1) by raising the market value of the statutory deposit from \$5,000 to \$25,000, and (2) by providing procedure to be followed by the insurance commissioner when request was made for release of the statutory deposit. Attached hereto is copy of amended section 649.06 as it is now effective.

AMENDED SECTION 649.06  
FLORIDA STATUTES, 1941

**649.06 DEPOSIT REQUIRED AND CIRCUMSTANCES UNDER WHICH RELEASED.**—(1) Any limited surety company, before the issuance of a certificate by the insurance commissioner, shall be required to deposit with said commissioner, bonds or certificates of indebtedness of the United States or bonds, time warrants, revenue certificates or certificates of indebtedness or any state, county, district or municipality in the United States or of any political subdivision or district of any state, having a market value of twenty-five thousand dollars. No limited surety company contemplated by this chapter and now operating in this state shall be authorized to transact business in this state after July 1, 1948, unless it shall, by said date, have deposited with the insurance commissioner bonds, time warrants, revenue certificates or certificates of indebtedness of the character described in the preceding sentence of this section of the market value of twenty-five thousand dollars; and it shall be the duty of the insurance commissioner after July 1, 1948, to cancel without notice the certificate of authority of any such company which does not have such deposit with the insurance commissioner. A receipt shall be issued by said commissioner for the obligations so deposited. Whenever such company ceases to do business in this State and has settled up all claims which may be chargeable against the deposit in the hands of the said commissioner, and has been released from all bonds and undertakings which they have executed as sureties or guarantors, said bonds or other securities, so deposited shall be released and delivered to the proper party on presentation of the commissioner's receipt for said bonds or other securities; provided, the insurance commissioner shall not release and deliver such deposit under said stated circumstances except in pursuance of the provisions of sub-section (2) hereof. While said bonds and other securities are so deposited with the commissioner, the owner of the same shall be entitled to collect the interest on the same. For the bonds and other securities so deposited, the faith of the state is pledged that they shall be returned to the party entitled to receive same.

(2) Whenever any such company shall have ceased to do business and the officers thereof, or the lawfully designated trustees thereof if such company has been dissolved, shall represent to the insurance commissioner that said company has settled up all claims which may be chargeable against said deposit, any request for release and delivery of said deposit by the insurance commissioner, as contemplated in preceding subsection (1) hereof, shall be accompanied by affidavit or affidavits of the officers of said corporation, or if dissolved, affidavit or affidavits of the lawfully designated trustees of such dissolved corporation, that such company has ceased to do business and has settled up all claims which may be chargeable against its said deposit in the hands of the insurance commissioner. Upon receipt of such request and affidavit or affidavits, the insurance commissioner shall make or cause to be made an examination of the books and records of said company. If such examination shall disclose unsettled claims against or outstanding obligations of said company which may be chargeable against said deposit, the insurance commissioner shall refuse such request for release and deliver of said deposit. If such examination shall not disclose any

such unsettled claims or outstanding obligations, the insurance commissioner shall cause to be published once each week in four consecutive issues of a newspaper of general circulation published in the county wherein the principal office and place of business of said company is located, a notice containing the matters herein set forth; or if no such newspaper is published in said county, said notice shall be posted in three conspicuous places in such county, one of which shall be at the court house door. Such notice shall be addressed to obligees and beneficiaries of outstanding bonds, contracts and agreements executed by such company and to claimants under any such bonds, contracts and agreements, requiring them to file with the insurance commissioner within ninety days from the date of first publication or posting of said notice a notice of claim, setting forth the name and address of the person filing such notice of claim and a description of the nature and amount of the outstanding obligation or claim, which notice of claim shall be verified under oath by the person filing the same. If at the end of ninety days from the date of the first publication or posting of said notice no such notice of claim has been filed with the insurance commissioner, it shall be his duty and he shall release and deliver such bonds and other securities comprising said deposit in pursuance of such request; but if during such ninety-day period any such notice or notices of claim have been filed with him, the insurance commissioner shall refuse to release and deliver said deposit until legal disposition has been made of any alleged unsettled claim described in any such notice or notices of claim, or until any such bond, contract or agreement described therein has ceased to be an outstanding obligation of said company. (As amended, Laws of 1947, c. 24290, Sec. 1; c. 24335, Sec. 1.)

April 18, 1947.—047-107.

#### REQUIREMENT TO LIQUIDATE—LEGALITY

**QUESTION:** Would a law requiring all corporations organized and existing under chapter 649, Florida Statutes, 1941, to cease operations and liquidate their affairs, within a period of time to be fixed in the law, be valid legislation?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 649 deals with the organization and operation of limited surety companies. This chapter authorizes such companies to incorporate under the provisions of chapter 612, Florida Statutes, 1941 (section 649.01).

Since the year 1819, when the Supreme Court of the United States issued its opinion in the case of *Dartmouth College v. Woodward*, 4 Wheat 518, 4 L. Ed. 629, subject to the exceptions hereinafter mentioned, it has been the rule of law that a charter granted by a state to a private corporation constitutes a contract between the state and the incorporators within the protection of the contract clause of the federal constitution; and that the state cannot by any law amend the charter so granted without the consent of the incorporators.

The state may amend or otherwise interfere with the powers granted in a corporate charter under the following circumstances: (1) when the state reserves, in the charter, or by statute or organic law existing at the time of the granting of the charter, the power to amend or change; (2) when the charter is amended or changed by the state in the valid exercise of its police power; and (3) in the exercise by the state of eminent domain affecting certain property or franchise rights of corporations.

Section 649.23 provides with respect to limited surety companies that the rights, privileges and liabilities of such corporations shall be determined and governed solely by the provisions of chapter 649 and those laws specifically referred to and adopted as a part of such chapter. It is not considered



that this provision contains any reservation by the state of the power of amending or changing the rights granted to any incorporated limited surety company.

In view of the foregoing, in my opinion the aforementioned question properly is answered as follows:

There appears to be nothing in said chapters 612 or 649, or in other law of this state, constituting a reservation by the state to amend or change the powers granted to a limited surety company. While certain conduct or practices of such a company might be fitting objects of valid police regulation, there appears to be nothing concerning the purposes and powers of such a corporation to justify termination of corporate existence under the guise of police regulation. Hence, it appears the aforementioned question properly is answered in the negative, i.e., that any law which would attempt to terminate the corporate existence of such a company would offend Article I, Section 10, United States Constitution.

January 16, 1947.—047-7.

#### DEPOSITS—RELEASE—DISSOLVED CORPORATIONS

QUESTION: Upon a finding that the outstanding liabilities of the dissolved limited surety companies, described below, do not exceed \$63,000, would it be legal and proper for the state treasurer to release certain securities?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

The request for opinion states that the Florida Surety Company and All American Surety Company, limited surety companies hitherto organized under chapter 649, Florida Statutes, 1941, have dissolved. Prior to dissolution, liability of these two corporations on all outstanding obligations was assumed by Pan American Surety Company, a duly authorized surety (not limited) under chapter 648. In addition to the showing of such assumption of liability by said Pan American Surety Company, said limited surety companies, in support of their applications to the state treasurer for release of their securities held by that official under section 649.06, Florida Statutes, 1941, have tendered an indemnity bond executed by Pan American Surety Company in the sum of \$63,000 guaranteeing the payment of any and all liabilities of such dissolved corporations.

In view of the answer given here to the foregoing inquiry, no investigation has been made of (1) the regularity of the dissolution of said corporations; (2) the manner and extent of assumption of the obligations of said corporations by Pan American Surety Company; or (3) the terms and coverage of the \$63,000 indemnity bond.

A limited surety company under said chapter 649, prior to issuance of its certificate, is required to deposit with the insurance commissioner securities, as described in the law, having a market value of \$5,000. "Whenever such a company ceases to do business in this state and has settled all claims which may be chargeable against the deposit in the hands of said commissioner, and has been released from all bonds and undertakings which they have executed as surety or guarantors," such securities may be released by the commissioner, as in the law provided. (Section 649.06.) Such required deposit is solely for the use and benefit of obligees of bonds executed by such a company, and the person named as beneficiary or obligee in contracts and agreements of guarantyship and suretyship executed by such company. (Section 649.07, Florida Statutes, 1941.)

An opinion of this office of April 26, 1946 (No. 046-176), dealt with the question of the release of such a deposit. The situation found in that opinion reasonably contemplated representation by the dissolved corporation that it had no outstanding obligations. That opinion is not determin-

ative of this question because of the dissimilar factual situation presented here.

In the case of *State ex rel. Union Indemnity Co. v. Knott*, 105 Fla. 569, 107 Fla. 770, 143 So. 221, 143 So. 296, involving the \$75,000 deposit required of surety companies under section 648.02, Florida Statutes, 1941, the court held that upon showing that the Union Indemnity Company, under a reinsurance contract, had "assumed all outstanding claims, known or unknown against New York Indemnity Company," including a specifically described public liability insurance policy issued by such latter company, all as described in detail in said case, the insurance commissioner was required to recognize an assignment by the latter company of its \$75,000 deposit under said section 648.02 to such Union Indemnity Company. It is recognized that, reasonably, it may be urged that if the agreement of Pan American Surety Company, in assuming the obligations of these two limited surety companies, is as comprehensive in its coverage as the contract of reinsurance described in said case, then such case is authority for release of these deposits.

Notwithstanding this persuasive Florida authority, grave doubt exists that the factual situation found here evidences such a "release from all outstanding bonds and obligations" which limited surety companies have "executed as sureties or guarantors," within the meaning of such quoted words as used in said section 649.06. The \$5,000 deposit and the purposes thereof are in pursuance of law; and until the purposes of such deposit have been met, the deposit constitutes a trust fund in the hands of the insurance commissioner which, properly, may not be diverted from such purposes. (Generally, on this subject see *Lancashire Ins. Co. v. Maxwell* (New York), 30 N. E. 192; *State v. American Bonding & Title Co. (Ia.)*, 221 N.W. 585; *Maurer v. International Ins. Corp. (Del.)*, 194 A. 360; *Cochrane v. Pacific States Life Ins. Co. (Colo.)*, 74 P. 2d. 196.) It is taken for granted that the contract under which Pan American Surety Company assumed the obligations of these limited surety companies was negotiated and entered into between the interested corporations without the participation, knowledge or consent of those for whose benefits such obligations had been executed and who held the same. It would seem that at least during the period permitted for proceeding against a dissolved corporation, an obligee or beneficiary under a contract issued by one of said companies would have the right of proceeding on a matured claim against such dissolved corporation, and as long as any such right of action exists, no release of liability has occurred. The report of the aforementioned Union Indemnity Company case does not evidence that the legal principles found in this paragraph were urged to or considered by the court in that case; and until the court has specifically ruled upon them, they should not be ignored.

In view of the foregoing, in my opinion the question is answered as follows:

Serious doubt exists that at this time the insurance commissioner should release to the aforesaid limited surety companies their statutory deposits of \$5,000 as requested by them; and because of such doubt he should make no determination pertaining to a request for release and delivery of such deposits until after expiration of the statutory period within which proceedings may be instituted on claims against dissolved corporations. There is no necessity, now, to determine what the status of such deposits may be when such statutory period has expired.

It is further remarked that the question presented obviously is a controversial one which could be settled by the proceedings employed in the aforementioned Union Indemnity Company case.

## CHAPTER XXXII

### BANKS AND BANKING

#### BANKING REGULATIONS

February 12, 1948.—048-58.

##### SURETY BONDS—COLLATERAL—SEMINOLE INDIANS

**QUESTION:** Are state banks of Florida empowered to deposit collateral or give depository or surety bond for deposit of funds belonging to Seminole Indians in excess of the amount of \$5,000 insured by the Federal Deposit Insurance Corporation?

*To Commissioner of Indian Affairs, Department of the Interior,  
Washington 25, D. C.:*

It is stated in request for opinion that the funds in question are not, strictly speaking, federal funds in the sense that the government has any proprietary interest in them, nor does the government hold the funds in trust for the Indians.

There is no statute in this state expressly authorizing the deposit of collateral to secure the deposit mentioned in the letter and in the absence of such a deposit I doubt the power of such banks to make such a deposit. (Sections 653.10-653.12, Florida Statutes, 1941; 9 C.J.S. 337, Section 157; 5 Zollmann, Banks and Banking 271, Section 3272; Vassar v. Smith, 134 Fla. 346, 183 So. 705; McNair v. Knott, 87 Fed. 2d 817, see also 302 U.S. 369.)

The statutes of this state neither expressly permit nor prohibit banks from securing any of their deposits with surety bonds, and so far as I have been able to ascertain the Supreme Court of Florida has never rendered an opinion upon this question. The general rule seems to be that banks may not secure deposits of private funds with surety bonds where any of their property, either directly or indirectly, becomes pledged in connection with such surety bond or deposit (see 9 C.J.S. 336-7, section 157; 5 Zollmann, Banks and Banking, 278 section 3273; and authorities above cited). Should a bank be able to obtain a surety bond securing a deposit of private funds, without pledging any of its property, the surety would probably be liable on such bond (see 50 C.J. 16, section 10; Cozine v. Randolph, 71 Fla. 603, 72 So. 177), although the bank's assets would not be liable, separate from its general liability to depositors.

August 13, 1947.—047-271.

##### FEDERAL FUND DEPOSITS—SECURITY—PLEDGE OF ASSETS

**QUESTION:** May banking institutions, organized and existing under the laws of this state, pledge their assets to secure the repayment of federal postal savings funds deposited by postmasters in this state?

*To Honorable Joseph J. Lawler, Third Assistant Postmaster General,  
Postal Savings System, Washington, D. C.:*

There appears to be a difference of opinion in the several states upon this question, in the absence of controlling statutes (9 C.J.S. 336, section 157). Some courts hold that banks have no power, in the absence of statute, to pledge their assets to secure deposits; other courts hold that pledges may be made to secure the deposit of public funds; and other courts hold that pledges may be made to secure the deposit of any funds, either public

or private. In this state the right of state banks to pledge their assets to secure deposits seems to be limited to public funds (*Vasser v. Smith*, 134 Fla. 346, 183 So. 705; *Davis v. Knott*, 109 Fla. 60, 147 So. 276; *First American Bank and Trust Company v. Town of Palm Beach*, 96 Fla. 247, 117 So. 900), such right being controlled by a legislatively established public policy (117 So. text 902). So far as I am able to ascertain the question of the right of banks of this state to pledge their assets to secure deposits made by federal agencies has not been decided by the Supreme Court of Florida.

By an opinion rendered on April 11, 1934 (1933-1934 Biennial Report of the Attorney General of Florida, page 301), the Honorable Cary D. Landis, a former attorney general of this state, rendered an opinion wherein he held that public funds deposited by postmasters in this state might be secured by the pledge of assets by a state banking institution. The reasons for the conclusions in this opinion are not clearly stated therein as to certain of the funds therein named.

Under section 653.13, Florida Statutes, 1941, state banking institutions of this state may become members of the federal reserve system of banks and of the federal deposit insurance system. In this connection such banks may "enter into such contracts, incur such obligations and generally do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or enure to banking institutions or to their depositors, creditors, stockholders . . ." Many of the banks of this state have taken advantage of the foregoing statute and are members of the federal reserve system of banks and of the federal deposit insurance system. Under section 265, title 12, of the United States Code, "all insured banks designated for that purpose by the Secretary of the Treasury shall be depositories of public money of the United States (including . . . postal savings funds) . . ." The aforementioned statute of this state seems to be broad enough to enable banks operating under the laws of this state to become depositories of postal savings funds and to put up securities in connection therewith as provided in the aforementioned section of the United States Code.

Although it seems clear that state banking institutions within the federal deposit insurance system may become depositories of postal savings funds and may pledge their assets as security for such deposits; the question of the right and authority of state banks not within the federal system is not very clear in this state. In the absence of some supreme court decision or express statute upon this question, upon which to base my opinion, I am unable to definitely say that banks, which are not members of the federal system, may pledge their assets to secure such deposits.

July 15, 1947.—047-202.

#### BANKING HOURS—PAYMENT OF CHECK-DEPOSIT

**QUESTION:** Is a bank protected, under section 653.83, Cumulative Supplement to Florida Statutes, 1941, in accepting deposits, or in paying, accepting or certifying checks, after regular banking hours and on holidays?

*To Honorable C. M. Gay, State Comptroller:*

In the absence of statute, such as section 653.83 Cumulative Supplement to Florida Statutes of 1941, bank deposits received after banking hours are valid and binding (note 15 A. L. R. 429); the payment of checks prior to banking hours is valid and binding (5 Zollmann, Banks and Banking, section 2691); dealing in checks after banking hours is valid and binding (5 Zollmann, Banks and Banking, Section 2693); certifying checks after banking hours is valid and binding (5 Zollmann, Banks and Banking,



section 2693). Banking hours are merely regulations for the convenience of the bank which may be waived (5 Zollmann, Banks and Banking, section 2694).

Section 653.83, Cumulative Supplement, Florida Statutes, 1941, is very probably declaratory of the existing law, and was enacted to set at rest any doubt as to the validity and binding effect of banking transactions taking place before or after banking hours on business days and on holidays. The purpose of the statute, doubtless, was to place such transactions on a parity with transactions taking place during banking hours.

I am, therefore, of the opinion that the obligations and liabilities of the bank concerning transactions within purview of section 653.83, Cumulative Supplement to Florida Statutes, 1941, are the same as those concerning transactions taking place during regular banking hours on business days.

### TRUST COMPANIES

June 16, 1948.—048-197.

#### FOREIGN CORPORATION—"TRUST" IN NAME

QUESTION: Franklin Title & Trust Company, a Kentucky corporation, has made application to the secretary of state for permit to transact business in Florida. The corporation, according to information furnished the secretary of state's office, does not do a trust business, does not contemplate doing a trust business in this state, but desires to be admitted to the state for the sole purpose of writing title insurance. In view of section 655.01, Florida Statutes, 1941, as amended, and the word "Trust" in the foregoing corporate name, should the secretary of state issue permit allowing such corporation to transact business in the state, provided it otherwise complies with the applicable laws?

*To Honorable R. A. Gray, Secretary of State:*

Section 655.01, prior to amendment by chapter 23660, Laws of Florida, acts of 1947, provided in part as follows:

"Hereafter no corporation shall be organized for the purpose of carrying on a trust company business in the State of Florida, except under the provisions of this article, and no company hereafter organized under any other act shall use the word 'trust' as a part of its name."

The quoted part of section 655.01, as amended by said chapter 23660, now provides as follows: "Hereafter no corporation shall be organized for the purpose of carrying on a trust company business in the State of Florida, except under the provisions of this article, and no company not authorized to carry on a trust company business shall use the word 'trust' as a part of its name."

Whether Franklin Title & Trust Company is authorized under its charter to engage in the business of a trust company is not apparent from information furnished. However, it would seem to be the intent and purpose of chapter 655, Florida Statutes, 1941, as amended, particularly section 655.27 when read in connection with section 655.01, as amended, to preclude a foreign company engaged in the exercise of powers contemplated by chapter 655 from qualifying to carry on such functions in this state. Reasonably it would appear that the mentioned amended part of section 655.01 is applicable not only to a domestic corporation but also to a foreign corporation seeking admission to this state.

In my opinion, therefore, the question is answered as follows:

Since this foreign corporation has the word "Trust" in its name, for the reasons appearing herein, it would seem that properly the secretary

of state should not issue a permit to said company to transact business in this state. Hence, the question is answered in the negative.

## CREDIT UNIONS

July 15, 1948.—048-235.

### INSURING BORROWERS—FEES FOR INSURANCE— INTEREST RATE

**QUESTION:** In the light of the special privileges granted credit unions under the statutes of this state, may they insure their loans against death or total disability of the borrowers and require the borrowers to pay the premiums thereon?

*To Honorable C. M. Gay, State Comptroller:*

In this state a credit union is a cooperative society for the two-fold purpose of promoting thrift among its members and creating a source of credit for them at legitimate rates of interest for provident purposes (section 657.01, Florida Statutes, 1941). It has power "to make loans to members for provident or productive purposes" (section 657.04). Interest rates are determined by the board of directors (section 657.09); however, this rate "shall not exceed one per cent per month on unpaid balances" (section 657.14). There are no court decisions in this state construing any of the foregoing statutes.

I have been informed by the president of one of the credit unions in this state that the usual policy issued is a blank one "covering payment of any balance due to the credit union upon the death or total disability of a borrower and a like amount of money will be paid the beneficiary of the borrower." The fee for the policy is paid in the first instance by the credit union, which fee is prorated among the individual borrowers. No profit appears to be made on the transaction by the credit union other than the protection accruing to it in case of the death or disability of a borrower.

The courts are divided in their views as to the effect of a requirement by the lender that the borrower pay a premium, in addition to the interest charged him, for the purpose of insuring the loan against the death or disability of the borrower (55 Am. Jur. 335, 366 and 382, sections 17, 57 and 86; 66 C. J. 232, section 170; annotations in 21 A. L. R. 876 et seq., 105 A. L. R. 811, and 143 A. L. R. 1333); however, all agree that if the requirement is intended as a shift or device to cover usury, the transaction will be illegal (see last above cited authorities). Where the lender pays a less amount for the insurance than that charged the borrower, the transaction would seem to be usurious (55 Am. Jur. 366, section 57, note 14).

Due to the absence of any decision of the supreme court of this state upon the question and the confusion of the decisions of the courts in other jurisdictions, it seems impossible to give any definite answer to the questions. Although I am of the opinion that where the credit union makes no profit on the transaction and only collects an amount equal to its expenses in this connection, such a requirement might be upheld in this state. I am of the opinion that any such credit union must take the responsibility of a possible adverse holding by the courts where such requirements are made by them.

## CHAPTER XXXIII

### COMMERCIAL RELATIONS

#### NEGOTIABLE INSTRUMENTS

September 12, 1947.—047-301.

##### SCHOOL BONDS—VALIDATION—EFFECTIVE DATE OF BONDS

**QUESTION:** If a legal election is held and a tax school district bond issue is voted, the bonds dated, sold and delivered prior to December 31, 1947, will the fact that a petition to validate the bonds will be filed after January 1, 1948, affect the validity of the bonds or the sale thereof due to the new school law which consolidates all tax school districts into one as of January 1, 1948?

*To Honorable Colin English, State Superintendent of Public Instruction:*

The validity of bonds is tested as of the date of issuance. Bonds are ordinarily considered issued as of the date of delivery to the purchaser. (State v. Fort Myers, 196 So. 705, and section 674.01, Statutes of 1941.) The filing of the petition for validation after the consolidation of all tax school districts into one on January 1, 1948, would not affect their validity no matter when the decree might be entered. Obviously, after January 1, 1948, the only tax school district bonds which could be issued would be those of the new tax school district No. 1 which results from the recent act consolidating all districts as of January 1.

##### WAREHOUSEMEN AND WAREHOUSE RECEIPTS

August 19, 1947.—047-260.

##### FIELD WAREHOUSING STORAGE OF NEGOTIABLE PAPER

**QUESTION:** Is the business of field warehousing and storage of negotiable paper authorized under the laws of this state?

*To Honorable C. M. Gay, State Comptroller:*

From the file submitted with the request for opinion, it appears that field warehousing and storage of negotiable paper usually consists of the warehouse company's procuring a separate warehouse room or cage in the establishment of some loan or finance company, or other person handling a large number of promissory notes or other negotiable paper, for the purpose of maintaining at such location an agent for the purpose of accepting, issuing receipts for, and storing, such negotiable paper as may be submitted for warehousing. The negotiable paper to be warehoused is usually delivered without endorsement and a nonnegotiable warehouse receipt is issued for the same. The loan, finance or other company warehousing the paper uses the warehouse receipt as a substitute for the warehoused paper in procuring loans upon the paper and for other purposes, without actual delivery of the said negotiable paper.

The Uniform Warehouse Receipts act is in force in this state (see chapter 678, Florida Statutes, 1941), and seems to relate to the warehousing of "goods" which are defined as "chattels or merchandise" (section 678.54, Florida Statutes, 1941). Nonnegotiable warehouse receipts may be issued under that chapter (section 678.04, Florida Statutes, 1941). The word "goods" has a broad meaning (18 Words and Phrases 518 et seq.), and has been held to include choses in action (18 Words and Phrases 524),

and promissory notes (18 Words and Phrases 527). (See also Epping v. Robinson, 21 Fla. 36, text 52, defining goods as including bills, notes, etc.)

The powers of banking institutions in this state are about the same as those of national banks (12 U.S.C.A. section 12; section 652.21, Florida Statutes, 1941), so that they would evidently have power and authority to accept warehouse receipts as security for loans, etc. (See 1 Zollmann, Banks and Banking, 308, section 362).

From the foregoing authorities it seems that the question should be answered in the affirmative.



## CHAPTER XXXIV

### REAL AND PERSONAL PROPERTY

#### CONVEYANCES OF MARRIED WOMEN'S INTEREST IN REAL ESTATE

February 27, 1947.—047-68.

##### COMMON PROPERTY—FORM FOR CONVEYING

**QUESTION:** Where title to land is held in the name of one spouse only, is it necessary under the Florida law to insert the name of the other spouse in the commencement part of a deed, the signatures of both spouses appearing in the testimonium part and the signatures of both spouses being properly notarized?

*To Honorable Gilbert A. Rounberg, Chief Engineer, Florida Inland Navigation District, Jacksonville, Florida:*

Where the property is in the name of the wife, the husband must join in the deed (see section 693.01, Florida Statutes, 1941).

In the case of *Evans et al. v. Summerlin*, 19 Fla. 858, it was there held that:

"Where the deed of a married woman, whereby she seeks to convey her separate property, contains the name of herself only as the grantee (grantor), and her husband is not named in the body of the deed, but signs the deed with her, and both duly acknowledge its execution, this is a sufficient assent and joining with her under the statute to convey the property of the wife."

Where the property is in the name of the husband, the wife joins in the conveyance ordinarily for the purpose of renouncing, relinquishing and conveying her dower and right of dower. This may be done by a separate instrument (see section 693.02, Florida Statutes, 1941).

Section 689.02, Florida Statutes, 1941, gives a suggested form of a warranty deed. Section 689.03, Florida Statutes, 1941, sets forth the effect of such deed and says:

"When signed by a married woman shall be held to convey whatever interest in the property conveyed that she may possess."

Section 689.04, Florida Statutes, 1941, sets forth the requirements of the acknowledgment of said deed.

In view of these sections of our law, if a married woman has signed a deed substantially in form as set forth in section 689.02, Florida Statutes, 1941, and duly acknowledged same as required thereby, I do not see where it is necessary for her name to appear in the commencement part.

In the case of homestead property, article X, section 4, of the Florida Constitution, says:

"Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by a deed . . . duly executed by husband and wife. . . ."

I would suggest that in the case of homesteads the names of both husband and wife appear in the commencement part.

## **CHAPTER XXXV**

### **ESTATES OF DECEDENTS**

#### **MISCELLANEOUS PROBATE PROVISIONS**

November 24, 1947.—047-390.

##### **FOREIGN ADMINISTRATION—RECORDING OF TRANSCRIPT OF ADMINISTRATION**

**QUESTION:** Is it necessary to record in record books kept by the clerk of the circuit court certified transcripts pertaining to the administration of estates probated in other states and embracing such portions of estate proceedings as the petition for probate, last will and testament, letters of administration, etc., or should they be recorded in the books kept by the county judge, or recorded in both the records of the circuit court and the records of the county judge?

*To Honorable Ray E. Green, Clerk of Circuit Court, Pinellas County, Clearwater, Florida:*

Section 736.06, Florida Statutes, 1941, as amended by chapter 22884, paragraph 1, Laws of Florida, 1945, and chapter 24341, paragraph 1, Laws of Florida, 1947, makes provision for the recording of foreign wills in the office of the county judge.

Section 734.29, Florida Statutes, 1941, as amended by chapter 22783 and chapter 22847, Laws of Florida, 1945, provides for the filing of certain papers against unadministered estates in the office of the county judge.

Section 732.07, Florida Statutes, 1941, as amended by chapter 22783, paragraph 2, Laws of Florida, 1945, sets forth what shall be recorded in the records of the county judge.

I am not unmindful that it is the thought of many attorneys that, inasmuch as papers such as those set forth in the question affect the title to real property, they should be recorded in the office of the clerk of the circuit court. I find no provision of law requiring same.

It is my opinion, therefore, that the papers mentioned and set forth in the question should be recorded in the office of the county judge.

#### **FLORIDA PROBATE LAW**

December 4, 1948.—048-353.

##### **TEACHERS' RETIREMENT SYSTEM—MURDER OF MEMBER BY BENEFICIARY**

**QUESTION:** A husband who was named beneficiary by a deceased member has been convicted of her murder and the conviction is now pending on appeal in the Supreme Court of Florida. The administrator of the deceased member's estate is demanding refund to him of the member's contributions to the retirement system. May this refund be made to the administrator?

*To Teachers' Retirement System, Tallahassee, Florida:*

Section 731.31, Florida Statutes, 1941, reads as follows:

"Any person convicted of the murder of a decedent shall not be entitled to inherit from the decedent or take any portion

of his estate as a legatee or devisee. The portion thereof to which such murderer would otherwise be entitled in the estate of the decedent shall pass to the persons entitled thereto, as though such murderer had died during the lifetime of the decedent."

In view of the fact that the conviction of the husband is pending on appeal in the supreme court, the contributions should not be refunded to anyone until that case shall have been finally determined. The final result of the prosecution will determine whether the contributions may be refunded to the husband or to the administrator.

## CHAPTER XXXVI

### DOMESTIC RELATIONS

#### HUSBAND AND WIFE

November 28, 1947.—047-392.

#### PHYSICIAN'S CERTIFICATE—DULY LICENSED PHYSICIAN—OSTEOPATH

**QUESTION:** Chapter 22738, Laws of Florida, 1945, provides as a condition precedent to the issuance of any marriage license that a certificate should be filed by a duly licensed physician that the applicants have been given such physical examination, including a standard serological test, as may be necessary for the discovery of syphilis, and that the applicant is not infected with syphilis, or if so infected, is not in a state of that disease which is or may become communicable to the marital partner. May the county judge accept certificates signed by osteopaths, chiropractors or naturopaths?

*To Honorable Lewis E. Purvis, County Judge, De Soto County, Arcadia, Florida:*

Section 741.05-1, Florida Statutes, 1941 (Comp. Pars. 1, 15, chapter 22738, 1945), reads as follows:

"After October 1, 1945, every person making application for license to marry shall file with the county judge, as a condition precedent to the issuance of any such license, a certificate from a duly licensed physician, which certificate shall state that the applicant has been given such serological test, as may be necessary for the discovery of syphilis, made not more than thirty days prior to the date of application for such marriage license; and that the applicant is not infected with syphilis, or if so infected is not in a stage of that disease which is or may become communicable to the marital partner."

The question thereupon arises, who are "duly licensed physicians" within the meaning and intent of the foregoing section?

In my opinion, one who practices osteopathic medicine is such a duly licensed physician. (See sections 459.07-08-09-13, Florida Statutes, 1941.)

I do not think it was the intention of the Legislature that a chiropractor be deemed such a duly licensed physician within the meaning of the above section 741.05. (See section 460.11, Florida Statutes, 1941.)

I do not think it was the intention of the Legislature that one who practices naturopathy be deemed such a duly licensed physician within the meaning of the above section 741.05. (See section 462.01, Florida Statutes, 1941.)

I am not unmindful of the recent decision of our supreme court, which, in effect, holds that naturopathic practice permits the prescribing and administering of certain narcotic drugs; however, I think this opinion must be strictly construed to the prescribing and administering of such drugs.



May 10, 1948.—048-162.

NATUROPATH—PHYSICIAN'S CERTIFICATE—  
PREMARITAL EXAMINATION

QUESTION: Is a naturopath a duly licensed physician and therefore authorized to perform the premarital physical examination required by section 741.05, Florida Statutes, 1941?

*To Honorable J. Lewis Purvis, County Judge, De Soto County, Arcadia, Florida:*

Under date of November 28, 1947, I issued an opinion (No. 047-392), in which I held a naturopath was not deemed a duly licensed physician within the meaning of section 741.05, Florida Statutes, 1941, as amended (see chapter 462). This opinion also, of course, dealt with other types of persons engaged in the practice of medicine; that is, other classes of medical doctors. As to the naturopath, I wish to change the opinion so rendered and to hold that a naturopath is deemed a duly licensed physician within the meaning of said section (section 741.05).

Upon reconsideration, as requested, of the matter dealt with here, I find that the Supreme Court of Florida, in the case of *State v. Baltzell*, 144 Fla. 278, 197 So. 783, held that naturopathy or naturopathic treatment was recognized in Florida as one of the healing arts and "it is entirely possible that the therapeutic processes of the school of *materia medica* and the school of naturopathic practice would in some cases overlap."

The expression "duly licensed physician" as used in section 741.05, is not qualified, confined or limited to the physician practicing any particular branch of the healing arts.

Under the *Baltzell* case, the supreme court, by its mandate, required the State Board of Health to make the use of laboratory facilities of the state available to these naturopaths.

I also consider that the provisions of section 462.11, Florida Statutes, 1941, subjecting doctors of naturopathy to all state, county and municipal regulations with reference to the control of contagious and infectious diseases, have a bearing upon this interpretation and give persuasion and weight to its correctness. I believe the status given this type of doctor under the statutory and court decision law, and the educational requirements imposed by our law upon him to permit his qualifying for his profession and its practice in our state, when considered together, are such as would entitle him to pass upon the requirements imposed under chapter 22738, Laws of Florida, 1945, (section 741.05, Florida Statutes, 1941, as amended) for the issues of marriage licenses.

A copy of this amendment is being duly added and substituted in the opinion aforementioned, in my office and sent to those receiving the original.

August 18, 1948.—048-271.

PERFORMING MARRIAGE WITHOUT LICENSE—  
RECORDING CERTIFICATE

QUESTIONS: 1. Is it a misdemeanor to perform a marriage ceremony without a license? (Section 741.08, Florida Statutes, 1941.)

2. Is it a misdemeanor for the official performing the ceremony to fail to return his certificate to the county judge within ten days? (Section 741.08, Florida Statutes, 1941.)

*To Honorable Geo. W. Burke, Chief Attorney, Veterans Administration,  
P. O. Box 1437, St. Petersburg, Florida:*

In request for opinion, it is pointed out that in the year 1945 the Legislature passed an act—chapter 22738—which act refers to a serological test and report, and that section 10 thereof, in part, states: “. . . or any person who shall otherwise fail to comply with the provisions of this act shall be guilty of a misdemeanor”; and that when this act was codified to the 1941 statutes, section 741.05-10, the word “act” was changed to read “law.” That because of this codification it is felt that the penalty, as provided in said section 741.05-10, might apply to one who performs a marriage ceremony without a license and to an official who performs the ceremony and fails to return his certificate to the county judge within ten days.

Said section 741.05-10 only applies to a violation of the law as provided by said chapter 22738, and was not intended to, and does not apply to a failure to conform to the requirements of section 741.08, Florida Statutes, 1941. The codification mentioned and the changing of the word in said section 741.05-10 by the codifiers thereof would have no effect thereon.

I find no law making it an offense to violate the provisions of the said section 741.08.

I, therefore, answer both of the questions in the negative.

March 1, 1948.—048-74.

#### LICENSE TO MARRY—MINORS—EXPECTANT PARENTS

QUESTIONS: 1. Under the provisions of section 741.06, Florida Statutes, 1941, is the county judge authorized to issue a marriage license to a male under the age of 18, or a female under the age of 16, without the consent of their parents, when the applicants acknowledge under oath that they are the parents or expectant parents of a child, if other provisions of the marriage law have been complied with?

2. Is the county judge authorized to issue a marriage license to a girl 16 years of age or older, but under the age of 21 years, or to a boy 18 years of age, or older, but under the age of 21 years, without the consent of their parents, if they acknowledge under oath that they are the parents or expectant parents of a child?

*To Honorable O. P. Johnson, County Judge, Kissimmee, Florida:*

(In the foregoing questions, I am assuming that the parents are living, that the minors have never been married before, that they have not had their disabilities of non-age removed and that a guardian of their person has not been appointed.)

Section 741.04, Florida Statutes, 1941, as amended reads as follows:

“Marriage license issued. No county judge in this state shall issue a license for the marriage of any person, unless there shall be first presented and filed with him an affidavit in writing, signed by both parties to the marriage, made and subscribed before some person authorized by law to administer an oath; reciting the true and correct ages of such parties, and unless both such parties shall be over the age of twenty-one years; provided, that if either of such parties shall be under the age of twenty-one years, such county judge shall not issue a license for the marriage of such party unless there shall be first presented and filed with him the written consent of the parents or guardian of such minor to such marriage, acknowledged before some officer authorized by law to take acknowledgments and administer oaths; provided, this

section shall not apply in any case where both parents of such minor shall be deceased at the time of making application for such marriage license; but no minor who has been before married shall be required to produce evidence of consent of parents or guardian as aforesaid; and provided, further, no marriage license shall be issued by any county judge in this state until after the expiration of three days from the date application is made to a county judge by the parties seeking to be married for the issuance of a marriage license, and it shall be the duty of the county judge to post a true copy of said application at the front door of the courthouse in the county where said application was made for a period of three days prior to the issuance of said marriage license. As amended, Laws 1945, c. 22643, §1."

Section 741.06, Florida Statutes, reads as follows:

"When marriage license may be issued to male under eighteen years or to female under sixteen years. No license to marry shall be granted to any male under the age of eighteen years, nor to any female under the age of sixteen years, with or without the consent of their parents, unless the applicants acknowledge under oath that they are the parents or expectant parents of a child, and in that event the license may be issued at the discretion of the judge."

Said section 741.06, as you will see, prohibits the granting of any license to marry to any male under the age of 18 years, or to any female under the age of 16 years, with or without the consent of their parents, unless they acknowledge under oath that they are parents or expectant parents of a child. This section does not affect the requirements of said section 741.04.

I therefore answer both of the questions in the negative.

January 2, 1947.—047-2.

#### MARRIAGE—AUTHORITY TO PERFORM—"COMMUNION"

QUESTIONS: 1. What is the interpretation of the word "communion" in section 741.07. What is the significance of said word in said section? Does it merely mean membership in some church or does it mean that the minister must be the pastor of some church?

2. In order to show that the license was executed by a person authorized to solemnize the matrimony, what do you recommend that he should show in his certificate?

*To Honorable William C. Brooker, County Judge, Hillsborough County, Tampa, Florida:*

In answer to the first question I invite attention to section 741.07, Florida Statutes, 1941, says:

"All regularly ordained ministers of the Gospel in communion with some church, . . . may solemnize the rights of the matrimonial contract, under the regulations prescribed by law."

In the absence of any court's construction of the word "communion," in my opinion the best definition would be—in good standing. Therefore, all regularly ordained ministers of the Gospel in good standing with some church may solemnize the said contract. The law does not contemplate that he shall be the pastor of a church.

Answering the second question, I would recommend that the language of the statute be followed.

January 25, 1947.—047-18.

#### MARRIAGE LICENSE—VALIDITY

QUESTIONS: 1. A couple who purchased their marriage license to be married before the three-day waiting period law, and before the blood test law went into effect, recently decided to use their license and were married. The license has now gone back to the office of the county judge to be recorded.

2. Is it valid for said couple to use this license that was purchased over a year previous, and would they be legally married?

*To Honorable Hiram W. Bryant, County Judge, Lee County, Fort Myers, Florida:*

Chapter 22738, Laws of Florida, 1945, requires a serological test before a license to marry shall be granted.

Section 8 of said act says:

"From and after the effective date of this act marriage license shall be valid only for a period of thirty days after issuance and no person shall perform any ceremony of marriage after the expiration date of such license."

Section 12 of said act says:

"From and after October 1, 1945, any person who enters into the contract of marriage without having first complied with this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished as prescribed by law."

It may be argued, and with some logic, that sections 8 and 12 only refer to licenses issued under and by the authority of said chapter 22738, and could not refer to marriage licenses issued before the passage of such act. However, I believe the better reasoning would be that said section 8 rendered invalid every marriage license thirty days after the issuance thereof; in which case, the marriage license as used by these parties would be invalid and the parties might have subjected themselves to penalties as provided by the said section 12.

As to the validity of the marriage, however, even though the marriage license should be declared invalid or if the parties had had no license at all, their marriage would be legal as Florida recognizes the so-called common law marriages. (See the case of *Caras v. Hendrix*, 62 Fla. 446; 57 So. 345.)

June 14, 1947.—047-161.

#### MARRIAGE CEREMONY—COURT CLERK

QUESTION: Is a duly qualified and acting clerk of the county judge's court authorized to perform marriage ceremonies, using the judge's seal?

*To Honorable Chas. C. Mathis, Jr., County Judge, St. Johns County, St. Augustine, Florida:*

Section 741.07, Florida Statutes, 1941, says:

"All regularly ordained ministers of the Gospel in communion with some church, and all judicial officers and notaries public of this state may solemnize the rites of the matrimonial contract, under the regulations prescribed by law."

The clerk of the county judge's court is not a judicial officer in my opinion within the meaning of this section, and I assume that the said



clerk is not a notary public of the State of Florida; therefore, the said clerk is not authorized to solemnize the rites of the matrimonial contract in this state.

May 17, 1948.—048-165.

SEARCHING FILES—FEES—MARRIAGE AND  
DIVORCE, CERTIFIED COPY

QUESTION: Does the Bureau of Vital Statistics have the power and authority to charge a fee of fifty (\$.50) cents for searching the marriage and divorce files and records when no certified copy is made?

*To Wilson T. Sowder, M.D., State Health Officer, Florida State Board of Health, P. O. Box 210, Jacksonville, Florida:*

It is my opinion that the Bureau of Vital Statistics may charge a fee for its service only when specifically authorized to do so by the Legislature of the State of Florida. I find no authority under the laws of the State of Florida for the charging of a fee for searching the marriage and divorce files of the Bureau of Vital Statistics when no certified copy thereof is made and delivered to the applicant. The question is therefore answered in the negative.

May 17, 1948.—048-167.

WOMAN TAX COLLECTOR—MARRIAGE—CHANGE OF NAME

QUESTION: If the tax collector of DeSoto county who is a woman should marry in the near future, or at any time, what effect, if any, would the change of name have on her rights and duties in said office?

*To Mrs. Edna M. Platt, Tax Collector, DeSoto County, Arcadia, Florida:*

Upon marriage the wife takes her husband's surname but otherwise her name is not changed. (Carlton v. Phelan, 131 So. 117.)

I understand that the tax list is advertised under said woman's present name. Her remarriage would have no effect on said advertisement.

If this woman marries before her tax certificates are signed, I would suggest that they bear her new name even if it should be necessary to overprint her signature on such tax certificates, if such tax certificates have already been printed.

While it might not be absolutely necessary, I would suggest, as a practical matter, that if, as and when this woman marries, that she file a certified copy of her marriage certificate with the secretary of state so that he can have knowledge of the change in name; that she attach a certified copy of her marriage certificate to her tax roll and also a certified copy to her sales record.

I trust these suggestions will answer the question.

BASTARDY

August 25, 1947.—047-277.

JUVENILE OFFENDER—CIRCUIT COURT—CIVIL PROCEEDINGS

QUESTION: A boy, in Orange county, under eighteen years of age is charged with being the father of a bastard child; the justice before whom the boy was brought was of the opinion that sufficient cause appeared to bind him over to appear at a term of a higher court. Should the justice bind the boy over to the criminal court of record or the juvenile court?

*To Honorable Jim Black, Sheriff, Orange County, Orlando, Florida:*

In my opinion, this justice should bind the boy over to neither court but should bind him over to the circuit court. See chapter 742.01, Florida Statutes, 1941, which reads as follows:

"When any single woman who shall be pregnant or delivered of a child, who by law would be deemed and held a bastard, shall make complaint to the county judge or the justice of the peace of the district where she may be so pregnant or delivered, and shall accuse any person of being the father of such child, such justice shall issue a process directed to the sheriff or constable of such county against the person so accused and cause him to be brought forthwith before him, and upon his appearance said justice shall hear the parties and any evidence which they may produce touching the charge, and if said justice shall be of the opinion that sufficient cause appears, he shall bind the person so accused in bond, with good and sufficient security, to be and appear before the next term of the circuit court for said county, and in the meantime to be of good behavior."

"Bastardy proceedings though quasi criminal in inception become civil when they reach circuit court." (State v. Rowe, 128 So. 7; Shepherd v. State, 119 So. 866; Edmond, N.E. v. State, 6 So. 58; Bond v. State, 15 So. 591.)

The criminal court of record would have no jurisdiction because these proceedings become civil when the justice binds the accused over. The juvenile court would have no jurisdiction of the case because section 4 of chapter 19113, Laws of Florida, 1939, does not seem to be broad enough to confer upon that court the jurisdiction to her and try such bastardy proceedings.

## CHAPTER XXXVII

### CRIMES

#### NUISANCES

August 27, 1947.—047-278.

##### AIR SAFETY—RECKLESS FLYING—FEDERAL REGULATION

QUESTIONS: 1. Would a federal statute authorizing state officers to enforce federal air safety regulations give such officer valid authority to act, in the absence of state legislation?

2. Is there any Florida law under which persons might be prosecuted who are guilty of "reckless flying"?

*To Honorable B. A. Meginnis, Attorney, Florida State Improvement Commission:*

The first question is a rather general hypothetical question, and it is obvious that any specific opinion relative thereto would depend on the terms and provisions of such federal statute, if and when same may be enacted. Generally speaking, doubt exists that an attempted delegation of authority by the federal government to state officers, under the circumstances reflected in the first question, would fall within the scope of official duties of such officers. However, any definite opinion of this office upon the subject would have to result from consideration of a specific federal statute purporting to confer such authority upon state officers.

With reference to the second question, I am of the opinion that section 823.01 of Florida Statutes, 1941, might be invoked, if in the course of operation of an aircraft a person should violate its provisions.

#### WEAPONS AND FIREARMS

August 5, 1947.—047-255.

##### ADJUTANT GENERAL—OBSOLETE WEAPONS— SALE OF WEAPONS

QUESTION: May the adjutant general sell to persons or companies who are duly licensed dealers or collectors of firearms, under the Federal Firearms Act, such weapons and firearms received by him under provisions of section 790.08 of Florida Statutes, 1941; as amended, that are unserviceable, obsolete, and not usable by any state department, county or municipality; and, if so what disposition should be made of the proceeds?

*To Honorable Mark W. Lance, Brigadier General, AGD, FNG, Adjutant General, State Arsenal, St. Augustine, Florida:*

It is noted that section 790.08, Florida Statutes, 1941, as amended, provides that firearms shall be delivered to the adjutant general under three different circumstances. Subsection (2) thereof, provides that upon conviction of the person, from whom the weapon or firearm was taken, of certain offenses such weapon or arms shall become forfeited to the State of Florida and forthwith delivered to the adjutant general.

Subsection (3) of said section 790.08 provides if the person from whom the weapons or arms were taken is acquitted but fails to reclaim the weapons or arms within sixty days, such weapons or arms shall be delivered to the adjutant general.

And subsection (4) of said section 790.08 provides that all such weapons and arms which have been found abandoned or otherwise discarded, or left in the hands of any peace officer of the state or any of its political subdivisions and not reclaimed by the owners, shall within sixty days, be delivered to the adjutant general.

Said section 790.08 further provides as follows:

"(5) Weapons and arms coming into the hands of the adjutant general pursuant to subsections (3) and (4) aforesaid, shall, unless reclaimed by the owner thereof within six months from the date the same come into the hands of the said adjutant general, become forfeited to the state and no action or proceeding for their recovery shall thereafter be maintained in this state.

"(6) Weapons and arms coming into the hands of the adjutant general as aforesaid shall be listed, kept and held by him as custodian for the state. Any or all of such arms suitable for use by the military department of the state may be so used under the direction of the adjutant general; and all such weapons and arms not needed by the said military department may be loaned to other departments of the state, or to any county or municipality having use for such weapons and arms. The adjutant general shall take the receipt of such other state department, county or municipality for such weapons and arms loaned to them. All weapons and arms which are not needed and are useless or unfit for use shall be destroyed or otherwise disposed of under the direction of the adjutant general, who shall make and preserve a list of such weapons destroyed or otherwise disposed of."

It will be noted that weapons and arms coming into possession of the adjutant general under subsections (3) and (4) do not become forfeited to the state until six months thereafter.

In view of the foregoing, it is my opinion that the words "otherwise disposed of" in the last sentence of subsection (6) are broad enough to authorize sale of weapons and arms which are not needed and are useless or unfit for use, provided such weapons and arms have become forfeited to the state.

It is my further opinion that the proceeds from any such sales should go into the state school fund, in view of section 4, article 12, of the Constitution of Florida, which reads in part as follows:

"The State School Fund . . . shall be derived from the following sources. . . The proceeds of escheated property or forfeitures. . . ."

## ISSUING WORTHLESS CHECKS AND DRAFTS

March 13, 1948.—048-92.

### WORTHLESS CHECKS—SUBSEQUENT PAYMENT

QUESTION: Is the prosecution of the maker of a worthless check barred by the fact that he makes part payment to the holder of the check?

*To Honorable Hugh Culbreath, Sheriff of Hillsborough County, Tampa, Florida:*

The governing statute on giving worthless checks, section 832.01, Florida Statutes, 1941, provides for the punishment of:

"Any person who, with intent to defraud, shall make, utter, draw, deliver or give any check, draft or written order upon any bank, person or corporation, and who secures money, property or other thing of value therefor, and who knowingly shall not have



an arrangement, understanding or fund with such bank, person or corporation, sufficient to meet or pay the same."

A violation of said statute is an offense against the state. The rule is that a prosecution by the state for a crime is not barred by the fact that the person injured by the commission of the crime has condoned the offense or made a settlement with the accused, unless there is statutory authority therefor. (22 C.J.S. 97-98, "Criminal Law," section 41.) I find no Florida statute providing that a settlement, in whole or in part shall bar the prosecution of a person who gives a worthless check in violation of said section 832.01.

Therefore, once the crime of giving a worthless check with intent to defraud is complete, subsequent payment of a part, or all, of the amount of the check will not bar prosecution against the maker for giving the check.

### SALE OF MORTGAGED PERSONAL PROPERTY; SIMILAR OFFENSES

February 13, 1948.—048-53.

#### PROPERTY REMOVED FROM STATE—CRIMINAL LIABILITY

QUESTION: Under a form of retain title contract for sale of personal property, where sale and delivery is made in county A, but property is carried to buyer's address which is listed in contract as being in county B, and collections are made by seller's agent in county B, where will the venue lie for a criminal prosecution under section 818.01, Florida Statutes, 1941, when the property is removed from this state by the buyer without consent of the seller?

*To Honorable Sam D. May, County Judge, Washington County, Chipley, Florida:*

"It has been held or stated in several cases that a statute prohibiting removal of the property from the county or state without the consent of the vendor refers only to the situs of the property, and not to its reasonable use." (47 Am. Jur. 980.)

"In all criminal prosecutions the trial shall be in the county where the offense was committed unless otherwise provided by law." (Chapter 910.02, Florida Statutes, 1941.)

It is permissible for the buyer to remove the property in the use thereof which may be deemed ordinary and contemplated by the parties at the time of sale. Where personal property such as furniture, is shown to be contemplated to be used in another county from that of delivery by the address listed as the home of the buyer on the face of the contract, and the agent of the seller later collects installments at the address listed by the buyer, there is an implied consent to removal of the personal property to the address listed and a further waiver as to the situs of the property by the collections of the agent.

It is my opinion that there can be no criminal liability or prosecution until there is a removal without the consent of the seller. Therefore, in this case, the venue is in county B.

### OFFENSES AGAINST SUFFRAGE

September 5, 1947.—047-281.

#### NATIONAL GUARD PARADE—MILITIA—CITY ELECTION

QUESTION: Will the parading and exercising of a National Guard unit or National Guard units in the City of Tampa on September 16, 1947,

as an incident of, and in connection with, observance of "National Guard Day," violate the provisions of section 875.06, Florida Statutes, 1941, in view of the fact that on such day there is being held in said city a run-off primary election to determine candidates for several contested offices for membership on the governing body of said municipality?

*To General Mark Lance, Florida National Guard, St. Augustine, Florida:*

It is not considered necessary, in this opinion, to attempt to answer either of these two questions: (1) Is a municipal election and "election" within the meaning of such quoted word as used in said section 875.06? (2) Is a primary election an "election," as such word is used in said statute?

The military authorities of the United States have inaugurated a program for a recruiting drive for enlistments in the National Guard in the several states and have designated the period September 16-November 16, 1947, for such campaign. In connection therewith the President of the United States on August 15, 1947, proclaimed September 16, 1947, as "National Guard Day," to be observed throughout the several states of the United States. In pursuance of the presidential proclamation, the governor of the State of Florida, by his proclamation of September 1, 1947, pledged the State of Florida to the observance of such day and to the support of the two months' campaign for National Guard recruiting contemplated by the national program. Consequently, throughout the State of Florida it is intended that on "National Guard Day" the National Guard in this state intends to have exercises and parades in observance of the day, the inaugurating of the national program, and in pursuance of the proclamations mentioned.

Section 875.06, Florida Statutes, 1941, was originally (in almost the same language), section 4, subchapter 12, chapter 1637, Laws of Florida, acts of 1868, and it is quoted as follows:

"If any officer or other person shall call out or order out any of the militia of this state to appear and exercise on any day during an election, except in cases of invasion or insurrection, or except in obedience to some civil magistrate to suppress riots or to enforce the law, he shall be fined not exceeding five hundred dollars, and be deprived of his office."

At the time of the adoption of the aforementioned law, the State of Florida was in what is historically known as the reconstruction period. Any student of the history of those times recalls that in certain sections of the South the governing authorities resorted to the use of the militia on election day to intimidate and coerce electors in connection with their use of the ballot. It is to be remembered that in 1868 the state militia was not integrated into the national defense as the National Guard is today; and further, serious doubt exists that the "militia" mentioned in said section is the National Guard of today. (See section 5, article XIV, Florida Constitution.)

In view of the foregoing, in my opinion the question is properly answered, as follows:

The observances of National Guard Day, in pursuance of the proclamations of the President of the United States and the governor of the State of Florida, in connection with the national program of recruiting for the National Guard in the several states, and the parading and exercising by National Guardsmen in the city of Tampa on September 16, 1947, as an incident of, and in connection with, such observance of "National Guard Day" will not constitute a violation of the provisions of section 875.06. In view of the apparent purpose and intent of said section, reasonably, the provisions thereof may not be urged as an impediment to the carrying out of the national program in Tampa on National Guard Day.

## GAMBLING

December 14, 1948.—048-362.

## BINGO—GAME OF SKILL OR CHANCE

QUESTION: Should a game in the nature of a bingo game, but alleged to be a game of skill, played by two or more persons with rubber balls, a box-like enclosure having numbered slots or holes therein and cards in the nature of bingo cards, be licensed where the winner of the game (who is the first person throwing said rubber balls into numbers which form horizontal, oblique or perpendicular rows of five numbers on the said bingo like cards) receives something of value in the nature of a purse, prize or premium?

*To Honorable W. O. Berryhill, County Tax Collector, Fort Lauderdale, Florida:*

From the information contained in the request for opinion, and ascertained upon investigation, it appears that the players of the game sit along a table in front of which is another table upon which are arranged box-like enclosures bearing slots or holes numbered one to seventy-five into which rubber balls may be thrown. For a fixed fee each player is given a card in the nature of a bingo card, and a given number of rubber balls which he throws, upon a signal from the operator, into the box-like enclosure. The object of the game is for each player to throw the rubber balls into the numbered slots or holes so that the numbers of such slots or holes in which the balls have come to rest will form a row of five numbers on the bingo-like-card in a horizontal, oblique or perpendicular row; the one who in point of time succeeds in so arranging the said five numbers on the bingo-like card is the winner and receives a prize, purse or premium. It seems possible that there might be more than one winner, although this may be unlikely. The number of balls being limited, it also seems to be possible that there might be occasions when no player will win. The skill of each individual player would seem to be a large factor in so arranging the balls in the slots or holes as to win the game. The chances of any player's winning the game would seem to depend not only upon his skill but also upon the skill of opposing players. Evidently, the game is not played merely for the game itself but also for the prize, purse or premium going to the winner. Although the amount of the prize, purse or premium is ascertained and determined prior to the time the playing is had, doubtless, estimates upon the fees to be received in any one game will play a part in fixing the amount of the same. Doubtless the prize, purse or premium is in the last analogy derived from fees paid to the operators of the game.

This game might be generally classified as an amusement device (section 205.21, Florida Statutes, 1941); however, said section 205.21 "shall not be construed to authorize the use of any game or device for gambling, or as a game of chance," such being prohibited by the statutes of this state (sections 849.01 and 849.14, Florida Statutes, 1941). I find that a game, identical with the one described, was held to be a game of skill and not one of chance by Superior Judge M. L. Berry of one of the Superior courts of New Jersey, which holding does not appear to have been reviewed by any appellate court.

It is the character of the game, and not the skill or want of skill of the players, which determines whether a game is one of chance or of skill; it is not to be tested by the standards of experts, or any limited class of players, but by that of the average skill of the majority of players likely to use the machine or game. (Annotation 135 A. L. R. 115 and 116.) By reference to an annotation in 135 A. L. R. 104-188, upon the question of what are games of chance, games of skill, and mixed games of chance and skill. I find that some courts appear to have held similar games to be games of skill while other courts have held like games to be games of chance or mixed games of chance and skill. The game in question is very similar to

a game called "five star final" considered by Supreme Court Justice Nova, in *Ehrman v. Kearney*, 39 N. Y. S. (2d) 257, (in which the said court held the game to be one of skill), but referred to on appeal by the Appellate Division (266 App. Div. 793, 41 N. Y. S. (2d) 696), and the Court of Appeals (292 N. Y. 627, 55 N. E. (2d) 505), as constituting a lottery "in that the dominant element determining the result of the game was chance and not skill." Similar games were involved in the cases of *Einziz v. Police Commissioners*, 138 Cla. App. 664, 32 P. (2d) 1103; *Brown v. Board of Commissioners*, 58 Cla. App. (2d) 473, 136 P. (2d) 617; *Asher v. Johnson*, 26 Cal. App. (2d) 79 P. (2d) 457; *Commonwealth v. Theatre Advertising Company*, 286 Mass. 405, 190 N. E. 518; *S. & R. Amusement Corporation v. Quinn*, 136 N. J. E. 420, 38 A. (2d) 571; *People v. Schapiro*, 77 N. Y. S. (2d) 727; *State v. Randall*, 121 Or. 545, 256 P. 393; some of which were held to be games of skill and others games of chance or mixed games of chance and skill; some legal and others illegal.

It is unlawful, under section 849.01, Florida Statutes, 1941, for anyone to have, keep or maintain in this state any table, implement or apparatus for the purpose of gaming or gambling. It is also unlawful, under section 849.14, Florida Statutes, 1941, for anyone to stake, bet or wager money upon the result of any trial or contest of skill, speed, power or endurance of man or beast or to receive any money so bet. In this case a purse, prize or premium is offered by the operator of the game, or a donor, for the winner of a contest for which he does not compete, which he will not get back if anyone wins the game. It, apparently, being possible that no person will win the purse, prize or premium so that the donor will get it back, the said prize, purse or premium from this view takes on color of a wager or a bet by the operator that no one will win. Where a purse, prize or premium is contributed by participants in a game and the successful participant is to have the fund created, such purse, prize or premium becomes in nature a bet or wager. (38 C. J. S. 152, section 88.) Although the purse, prize or premium is furnished by the operator it doubtless is derived from funds paid in in connection with the game or like games.

In the light of these observations it seems probable that the game in question, in the manner it is played, will constitute a violation of either section 849.01 and 849.14, Florida Statutes, 1941, or both of such sections. I do not think that a license should be issued for such game unless and until a court of competent jurisdiction upon proper application holds the game to be one of skill and not one of chance or mixed chance and skill.



## CHAPTER XXXVIII

### CRIMINAL PROCEDURE

#### ARRESTS

March 1, 1948.—048-73.

##### ARRESTING OFFICER—WITHOUT A WARRANT— COMPLAINT BEFORE MAGISTRATE

**QUESTION:** Where a state law enforcement officer, seeing a misdemeanor or felony being committed in his presence, arrests such person without a warrant—the person arrested, before a warrant has been issued, informing the arresting officer that he is guilty and desires to enter a plea of guilty to the offense—is it necessary for the arresting officer to get a warrant and have a preliminary hearing or can the arresting officer immediately inform the prosecuting officer that the defendant desires to enter a plea of guilty and a hearing be had before the trial court for disposition? (This could possibly be done through the filing of a direct information and issuance of a *capias*.)

*To Honorable A. J. Burnside, Clerk of Circuit Court, Pasco County,  
Dade City, Florida:*

Section 901.23, Florida Statutes, 1941, reads as follows:

“Duty of officer after arrest without warrant. An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.”

It is my opinion that this statute requires an officer who makes an arrest without a warrant to take the person arrested before a magistrate and to make a complaint before such magistrate, and that the statute should be complied with.

December 17, 1947.—047-437.

##### PLEA OF GUILTY—PROCEDURE ON ARREST— COMMITTING MAGISTRATE

**QUESTIONS:** 1. What procedure should be followed when a sheriff or constable arrests a person under a warrant issued by a committing magistrate who is without authority to try the offense charged. The person arrested advises the arresting officer that he is guilty and wishes to plead guilty. Does the arresting officer have the option to (a) carry the person arrested before the committing magistrate who issued the warrant for a preliminary examination, or (b) in lieu thereof, notify the prosecuting attorney of the trial court having jurisdiction over the offense, so that an information may immediately be filed in such trial court and the defendant taken before such court to plead guilty and have judgment and sentence imposed?

2. Is it mandatory for (a) the committing magistrate, at the time commitment papers are sent by him to the trial court, and (b) the sheriff who makes an arrest other than on a *capias*, to transmit to the prosecuting

attorney of the trial court having jurisdiction the report specified in section 923.01, Florida Statutes, 1941?

*To Honorable A. J. Burnside, Clerk of Circuit Court, Pasco County, Dade City, Florida:*

The procedure to be taken after the accused has been arrested is set forth in sections 901.06 (arrest by virtue of warrant), and 901.23 (arrest without warrant), Florida Statutes, 1941, and these sections require the arresting officer to take the person arrested before a magistrate. The duties of the magistrate when the accused is brought before him upon an arrest are set forth in section 902.01. Section 902.02 sets forth the procedure when the accused waives examination.

In view of these statutes, and in view of the fact that the warrant under which the arrest is made commands the arresting officer to carry the defendant before the committing magistrate who issues the warrant, it is my opinion that it is the duty of the arresting officer to carry the defendant before said magistrate to be dealt with according to law.

I answer the second question in the affirmative, inasmuch as section 923.01, Florida Statutes, 1941, says:

"It shall be the duty of each committing magistrate at the time commitment papers are sent by him to the proper trial court, and the sheriff when an arrest is made, other than on a capias, to transmit to the prosecuting attorney of the trial court having jurisdiction a report. . . ."

The chairman of the committee of the Florida bar who prepared this section for introduction in the Legislature has made the following comment on this section which I think expresses the intention of this section:

"It requires the committing magistrate at the time he sends and transmits to the proper trial court his record as required by section 42 (902.18, Florida Statutes, 1941), supra, that he also transmit to the prosecuting attorney of the trial court having jurisdiction a report giving the prosecuting attorney certain information. This report is also required by the sheriff as soon as he makes an arrest under any authority or any reason other than under a capias, because the capias is only issued after the filing of an indictment or information. This is very important. Of course, the particular form of the report may be improved upon, but the purpose is to give to the prosecuting officer information as quickly as possible so that he may take immediate action and relieve the crowded condition in jail and greatly expedite the disposition of criminal cases."

May 23, 1947.—047-154.

#### MUNICIPAL OFFICER—ARREST OUTSIDE CITY

QUESTIONS: 1. May a person who is both a deputy sheriff and a police officer of a municipality make an arrest outside the corporate limits of the municipality and return the offender to the municipality for trial?

2. Where such officer makes an arrest outside the municipality, may he accept from the person arrested an appearance bond conditioned upon the latter's return to the municipality for trial?

*To Honorable Millard F. Caldwell, Governor:*

Section 901.15(1), Florida Statutes, 1941, as amended, provides that a peace officer may without warrant arrest a person when the person to be arrested has committed a felony or misdemeanor or violation of a municipal ordinance in his presence, and that in case of such arrest for a misdemeanor or violation of a municipal ordinance, arrest shall be made

immediately or on fresh pursuit. A municipal police officer is a "peace officer," and by giving the wording of said section 901.15 (1) its obvious meaning, there appears to be authority for such police officer to arrest for crimes under the state law, and for deputy sheriffs to arrest for violations of city ordinances, under the circumstances and as in said section provided. There is nothing novel in such authority granted, for practically the same power to arrest was provided by section 8323, C. G. L. (originally section 1, chapter 4925, Laws of Florida, acts of 1901).

On October 31, 1946, this office issued an opinion (No. 046-458) that under the general laws a municipal police officer in whose presence a municipal ordinance is violated may not on immediate pursuit arrest the violator beyond the limits of the municipality. It is recognized, of course, that there is the possibility that there may be municipalities in this state under whose charters police officers are granted certain extra-territorial jurisdiction.

Section 168.03, Florida Statutes, 1941, provides that process of a mayor's court or other municipal court in this state shall extend to, and may be served anywhere, within the territorial limits of the county in which said city or town is located, and all warrants, etc., of such courts may be served by the city or town marshal, his deputies, or other executive officer of such courts anywhere within the territorial limits of such county.

In view of the foregoing, in my opinion the questions are answered in their numbered order as follows:

(1) Under the general laws, a municipal police officer may not arrest a person charged with violating a municipal ordinance beyond the corporate limits of the municipality, except in pursuance of warrant issued by the proper municipal court and placed in his hands for execution, and then not beyond the county in which the municipality is located. As indicated, such powers of a municipal police officer may, in certain instances, be enlarged or limited by the governing laws of particular municipalities. A deputy sheriff under the authority of said section 901.15 (1), as amended, may arrest without warrant any person who violates a municipal ordinance in his presence, if such arrest is made immediately or upon fresh pursuit. Since, by law, process of a municipal court does not extend beyond the county wherein the municipality is located, it is doubtful that a deputy sheriff could lawfully pursue and take into custody such an offender beyond the limits of said county.

(2) The laws and ordinances applicable in each municipality determine the proper officer for acceptance of appearance bonds from persons charged with violating city ordinances of such municipality. Answer to this question would require consideration of the applicable laws and ordinances of the particular municipality, and knowledge of the circumstances of the arrest made outside the corporate limits of the municipality.

### PRELIMINARY EXAMINATION

August 27, 1948.—048-282.

#### COMMITTING MAGISTRATES—JURISDICTION

**QUESTION:** May a committing magistrate, upon determination by him that he has erroneously and without sufficient cause, entered an order committing an accused person to jail, in default of bail for his appearance in trial court, recall, vacate and set aside that order of commitment and discharge accused at any time before an indictment or information has been filed, or information refused, or no true bill found and the accused thereby discharged?

*To Honorable Lewis E. Purvis, County Judge, Arcadia, Florida:*

I find no statute which retains in a committing magistrate jurisdiction over an accused after such accused has been committed to answer a criminal charge in a trial court. In the absence of such a statute, it appears that the jurisdiction of a committing magistrate terminates when he commits an accused to a trial court to answer a criminal charge, and the order of committal for trial at once confers jurisdiction of the accused on the trial court. I quote from 22 Corpus Juris Secundum 507, "Criminal Law," section 346, as follows:

"In the absence of a statute, the functions of a committing magistrate and his jurisdiction over accused terminate when he commits or remands him, or when he takes his recognizance or admits him to bail, and he has no authority to grant a rehearing or new examination. If injustice has been done, complete relief can be obtained by a writ of habeas corpus from the proper court. An order of committal for trial at once confers jurisdiction of accused on the trial court, and he can be discharged or released on bail only by a court having power to entertain a writ of habeas corpus."

It is, therefore, my opinion that the question must be answered in the negative.

March 12, 1948.—048-88.

#### WITNESS FEES—DEPUTY SHERIFF—MILEAGE

QUESTION: 1. Is a bonded deputy sheriff, who is not paid by the state or county, entitled to witness fees and mileage when summoned to testify before the county solicitor or the state's attorney to give testimony preliminary to the trying of a case?

2. Would such deputy sheriff be entitled to witness fees and mileage when summoned to testify in a trial of a case in court?

3. Would the fact that such deputy sheriff is paid an arrest fee of \$5.00 affect his right to such fee and mileage?

*To Honorable DeWitt Sinclair, Sheriff, Polk County, Bartow, Florida:*

The following questions are answered in their numbered order:

(1) The Honorable George Cooper Gibbs on January 15, 1940, rendered an opinion in which he held in effect that section 902.19, sub-section 4, Florida Statutes, 1941, which reads as follows: "No sheriff, deputy sheriff, constable, deputy constable, highway patrolman, or other person employed or paid by the state or any county thereof as a law enforcement officer, shall be entitled to witness fee or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence," does not prohibit payment of witness fees or mileage when the deputy sheriff is summoned to appear before the prosecuting attorney in preliminary investigations. (A.G.O. 1939, page 89.)

(2) In several opinions by this office (A.G.O. 1945, page 132; A. G. O. 1941, page 53), it has been held that the deputy sheriff is not entitled to fees and mileage when summoned to testify at a trial of a criminal case before a court sitting in the county in which he holds office, is employed, or has his residence.

(3) This office has held that the words in said section 902.19, "or other person employed or paid by the state or any county thereof, as a law enforcement officer" was not intended to, nor did it qualify or refer to the preceding named officers. Therefore, whether or not the deputy was paid an arrest fee of \$5.00 would not affect the answers to the questions 1 and 2. (A.G.O. 1941, page 769.)



## BAIL

June 21, 1948.—048-207.

### FORFEITURE OF BAIL BOND—AUTHORITY OF COUNTY JUDGE

**QUESTION:** Does the county judge have authority to collect bonds that are forfeited before him; if so, what disposition should be made of the money?

*To Honorable T. M. Anderson, Sheriff, DeSoto County, Arcadia, Florida:*

This opinion is confined to bail bonds and to moneys and securities posted as bail, in cases brought in the county judge's court.

Section 903.16 authorizes officials to accept money and certain non-registered bonds in lieu of the usual bail bond with sureties.

Section 903.34 (paragraph 1) Florida Statutes, 1941, provides what officers shall admit to bail and includes county judges.

Either the county judge or the sheriff may approve bail bonds, or cash and securities deposited in lieu of said bail bond. (Section 903.34 (paragraph 2) Florida Statutes, 1941, and section 903.16, Florida Statutes, 1941.)

The bail bond or the cash and securities given in lieu of a bail bond may be deposited either with the county judge or the sheriff, except that section 903.34 (2) requires appeal bonds to be approved by the county judge.

Whether the money or securities given in lieu of a bail bond are deposited with the county judge or with the sheriff, if the undertaking is breached, then the money or the proceeds of the bond shall be deposited in the fine and forfeiture fund of the county. Provided, of course, a proper judgment of forfeiture declaring that the undertaking of the defendant and the money or bonds deposited for bail are forfeited because of such breach (section 903.26, Florida Statutes, 1941), and provided further that the forfeiture is not discharged within ten days from and after the entry of the order of forfeiture, as provided by section 903.27, Florida Statutes, 1941).

If the undertaking is one secured otherwise than by the deposit of money, or bonds as provided by section 903.16, Florida Statutes, 1941, the procedure to enforce the forfeiture is provided by section 903.28, Florida Statutes, 1941, in connection with which should be read section 932.45, Florida Statutes, 1941.

April 24, 1948.—048-134.

### BONDSMAN, PROFESSIONAL—BAIL—SURRENDER OR PRINCIPAL

**QUESTION:** Does a professional bondsman, a surety on a bail bond, have the right to seize his principal in one county of the State of Florida and deliver him to the authorities in another county before the forfeiture of said bond for the purpose of surrendering him?

*To Honorable Julian C. Calhoun, Attorney, Palatka, Florida:*

A professional bondsman is defined by section 903.10, Florida Statutes, 1941. However, a professional bondsman's rights are the same as any other bondsman on a bail bond.

Section 903.22, Florida Statutes, 1941, says:

"For the purpose of surrendering the defendant, the surety may arrest him before the forfeiture of the undertaking, or, by written authority indorsed on a certified copy of the undertaking,

may empower any peace officer to make arrest, first paying the lawful fees therefor."

Arrest for the purpose of surrender on bail and recognizance is fully discussed in 6 Am. Jr. pages 112-115, both inclusive. See also annotations 3 A.L.R. 184 and 73 A.L.R. 1370, also United States Supreme Court in *Reese v. United States*, 9 Wall (U.S.), 13, 19 L. Ed. 541.

In the light of this law and these decisions the question is answered in the affirmative.

January 23, 1947.—047-9.

#### APPROVAL BY CONSTABLE—AUTHORITY

QUESTIONS: 1. Does a constable have authority to approve appearance bonds in criminal cases?

2. Does a constable have authority to approve bonds for fine and costs in criminal cases?

*To Honorable H. Isle Enzor, Sheriff, Okaloosa County, Crestview, Florida:*

I assume that the first question pertains to appearance bonds given by defendants in cases made against them in justice of peace courts or county judge's courts, and my answer thereto will be confined to appearance bonds given in cases pending in said courts.

Section 903.34 (2), Florida Statutes, 1941, specifies the officers who may approve appearance bonds in cases in county judge's courts and justice of the peace courts, but does not authorize constables to approve such bonds.

Therefore, with the exception hereinafter mentioned, it is my opinion that constables have no right to take and approve appearance bonds before a county judge's court or justice of the peace court.

The exception to this rule is where a warrant upon which the amount of bail to be accepted has been indorsed in compliance with section 901.03, paragraph 7, Florida Statutes, 1941, is placed in the hands of a constable for service. It is my opinion that when a constable executes a warrant so indorsed such constable has the right to accept and approve an appearance bond, with good and sufficient sureties, in the amount so indorsed upon such warrant.

The reason for this is that section 9, Declaration of Rights of the Constitution of Florida provides that:

"All persons shall be bailable by sufficient sureties except for capital offenses where the proof is evident or the presumption great."

which constitutional provision has been construed in the supreme court in *Ex Parte Hatcher*, 98 So. 72, to give a defendant an absolute right to make bail in a bailable case upon his arrest.

In answer to the second question, my opinion is—if the constable is charged with the execution of the judgment and the court entering said judgment is not in session, a constable may approve same. (See Section 921.15, Florida Statutes, 1941, and case of *Walling v. Carlton*, 147 So. 236, 239.)

April 11, 1947.—047-110.

#### FORFEITURE—CRIMINAL BONDS

QUESTION: In Bay County, Florida, where does the responsibility and obligation rest to enforce the penalties and forfeitures provided by

bail bonds in criminal cases in event there is a breach of the undertaking: (a) in justice of peace courts? (b) in county judges' courts? (c) in circuit courts?

*To Honorable W. S. Weaver, Clerk, Board of County Commissioners,  
Bay County, Panama City, Florida:*

If money or bonds have been deposited as bail and the terms and conditions of the undertaking are breached by the failure of the defendant to appear, or otherwise, as the case may be, the court before whom the cause is pending should enter a judgment of forfeiture, declaring that the undertaking of the defendant and the money or bonds deposited for bail are forfeited because of such breach (section 903.26, Florida Statutes, 1941). If this forfeiture is not discharged within ten days from and after the entry of the order of forfeiture (section 903.27, Florida Statutes, 1941), the money or proceeds of the bonds should be paid into the fine and forfeiture fund of the county.

This will apply to all three of the courts named.

If the forfeiture is not discharged and if the undertaking is one secured otherwise than by the deposit of money or bonds, the procedure to enforce the forfeiture is provided by section 903.28, Florida Statutes, 1941, in connection with which should be read section 932.45, Florida Statutes, 1941.

"903.28 Enforcement of forfeiture: If the forfeiture is not discharged, and the undertaking is one secured otherwise than by the deposit of money or bonds, the prosecuting attorneys shall immediately after the lapse of thirty days after the date of forfeiture, but in any event within one year from said date, proceed against the defendant or any surety upon his undertaking as follows: The prosecuting attorney shall file a certified copy of the order of the court or judge forfeiting the same, in the office of the clerk of the circuit court of the county wherein such order shall have been made, and thereupon the judge of the circuit court in said county shall enter judgment against the person bound by the undertaking for the amount of the penalty of said undertaking, and execution shall be issued to collect the amount of said undertaking."

"932.45 Proceedings on estreat of bond; sureties to be called: When any bond is taken for the appearance of any person charged with a criminal offense before any court in this state, and such person fails to attend said court as prescribed in the bond, the presiding judge of said court shall cause the sureties on the bond to be called upon to produce the body of the person for whose appearance they have given bond."

The justice of the peace court does not have a prosecuting attorney. In my opinion, the justice of said court should file a certified copy of his order forfeiting the bail in the office of the clerk of the circuit court of the county wherein such order shall have been made.

In the case of the county judge's court and of the circuit court, the officer charged with the duty of prosecuting the particular case in which the bail bond is given should, upon such bail bond's being forfeited, perform the ministerial act of filing a certified copy of the order of forfeiture in the office of the clerk of the circuit court. The circuit judge is thereupon required to enter judgment against the person bound by the undertaking.

In 1941, in an opinion rendered by me, and to which I still adhere, I stated that in the event of any further proceedings on a judgment so entered by the circuit court, it is the duty of the state attorney under section 27.02, Florida Statutes, 1941, to represent the state in such proceedings

except in those counties where the board of county commissioners have, pursuant to the provisions of special or local laws, contracted with private attorneys for the collection of criminal bail bonds.

## PROCESS UPON INDICTMENT AND INFORMATION

December 1, 1947.—047-396.

### ISSUANCE OF CAPIAS—EFFECT OF GUILTY PLEA

**QUESTIONS:** Is it necessary that a capias be issued by the clerk of county court on each and every information filed, even though the defendant wishes to, and does plead guilty immediately following arraignment?

Is it necessary that a capias be issued if the defendant wishes to plead not guilty and give bond—amount set by the county judge—for appearance at the next regular term of court?

*To Honorable M. W. Baldree, Sheriff, Sumter County, Bushnell, Florida:*

Section 907.01, Florida Statutes, 1941, advises:

"Upon the filing of an indictment or information, if the person named therein is not in custody or at large on bail for the offense charged, the judge shall direct the clerk to issue immediately or when so directed by the prosecuting attorney, a capias for the arrest of such person. The judge under the filing of the information or indictment shall indicate the amount of bail, if the offense is bailable, in which case an indorsement shall be made on the capias and signed by the clerk, to the following effect: The defendant is to be admitted to bail in the sum of ..... dollars."

In view of the foregoing section of the law, both of the questions should be answered in the negative.

However, if the judge of the court in which the indictment was presented or the information filed feels it necessary that a capias be issued for the arrest of the accused in the event of either of the circumstances aforementioned, he would have the authority to issue same. (Ex parte Cribbs, 146 So. 912.)

## MOTION FOR NEW TRIAL AND ARREST OF JUDGMENT

April 10, 1947.—047-102.

### COSTS—PAYMENT BY SOLVENT DEFENDANT

**QUESTION:** Where a solvent defendant, who has been convicted of a crime in a criminal court of record, appeals to the supreme court, to whom shall he pay the accrued costs which must be paid as one of the prerequisites to the appeal operating as a supersedeas?

*To Honorable Louie Carter, Clerk of Criminal Court of Record, West Palm Beach, Florida:*

A solvent defendant who appeals from a conviction of crime must pay all costs which have accrued in the case up to that time in order to obtain a supersedeas. See section 920.02 (4), Florida Statutes, 1941.

If the judgment and sentence impose the costs on the convicted defendant, and if a commitment to enforce the sentence has been issued to the sheriff, then I think that the costs of the accused should be paid to the



sheriff by a defendant, who wishes his appeal from a conviction in the criminal court of record to operate as a supersedeas.

However, unless the costs have been imposed on the defendant and a commitment has been issued to enforce the sentence, the sheriff is without authorization to collect the costs, and in such case I am of the opinion that they should be paid to the clerk of the criminal court of record. The costs so paid, regardless of which officer collects them, are to be paid into the Fine and Forfeiture Fund.

## JUDGMENT AND SENTENCE

July 30, 1948.—048-264.

### CONSECUTIVE SENTENCES—BREAKING AND ENTERING

QUESTION: In view of the facts set forth hereafter, do any two or more of the sentences run consecutively?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

On November 19, 1937, Jesse Currington was sentenced by the Circuit Court of Pasco County for a period of five (5) years for breaking and entering. This sentence was completed on September 5, 1941.

On November 29, 1937, Jesse Currington was sentenced by the Criminal Court of Record of Hillsborough County for a period of ten (10) years for possession of burglary tools. This sentence was completed on December 19, 1943.

On January 17, 1938, Jesse Currington was sentenced by the Criminal Court of Record of Palm Beach County for five (5) years, in case No. 3796, for breaking and entering; "said sentence to begin at the conclusion of that sentence passed upon the defendant herein in Hillsborough County, Florida."

On January 17, 1938, Jesse Currington was sentenced by the Criminal Court of Record of Palm Beach county for five (5) years, in case No. 3797, for breaking and entering; "To begin at the conclusion of that certain sentence passed in case No. 3796."

On February 14, 1938, Jesse Currington was sentenced by the Circuit Court of Highlands County for five (5) years for breaking and entering.

The question is presented, therefore, as to whether, in view of the foregoing facts, any two or more of the sentences run consecutively.

It is to be noted that all the sentences were imposed prior to the enactment of section 921.16, Florida Statutes, 1941.

Under the decisions of the Supreme Court of Florida in the cases of *Wallace v. State*, 41 Fla. 547, 26 So. 713, 725; *Lake v. McClelland*, 101 Fla. 536, 134 So. 522; and *Gillman v. Chapman*, 150 Fla. 724, 8 So. (2d) 653, it is apparent that the wording in either of the two sentences from the Criminal Court of Record of Palm Beach County is not sufficient to cause said sentences to run consecutive to each other.

Further, the sentence of five (5) years imposed by the Circuit Court of Highlands County did not contain any provision for said sentence to run consecutively with any other sentence.

However, in *Lindsey v. Mayo*, 153 Fla. 465, 14 So. (2d) 809, the Supreme Court of Florida held that:

"The rule as stated in the *Gillman* case does not apply where different sentences are imposed by different courts, and in such

cases the sentences will be held to run consecutively, the latter beginning at the expiration of the former. . . ."

On the basis of the foregoing, it is my opinion that:

(1) The two sentences of five (5) years each, imposed by the Criminal Court of Record of Palm Beach County, run concurrently with each other, but consecutive to the sentence of ten (10) years imposed by the Criminal Court of Record of Hillsborough County.

(2) The sentence of five (5) years imposed by the Circuit Court of Highlands County runs consecutive to the concurrent sentences of the Criminal Court of Record of Palm Beach County.

June 30, 1948.—048-220.

#### FINE AND COST BONDS—DEFAULT—JUDGMENT SATISFACTION

QUESTIONS: 1. If a defendant gives a 90-day fine and cost bond and he fails to pay said bond before ninety days expire and his bondsman pays same and asks that he be picked up to serve the sentence, what papers will it be necessary to issue for the sheriff to rearrest the defendant?

2. After the defendant serves his sentence, will the bondsman be refunded his money?

3. Who should issue and approve a fine and cost bond, the sheriff or the county judge?

*To Honorable W. M. Brown, County Judge, Baker County, Macclenny, Florida:*

I assume that the bond mentioned is the one provided for by section 921.15, Florida Statutes, 1941, which is one given for stay of execution of sentence for fine and costs.

I further assume that the bond so given was not paid by the defendant before the expiration of the time mentioned therein, to-wit: ninety days, and thereafter was paid by the sureties as they were obligated so to do.

In answer to the first question, it will not be necessary to give any papers to the sheriff to rearrest the defendant, for when the sureties upon the said bond pay the said bond after the same become due and payable, then the judgment of the court is satisfied and the defendant cannot be rearrested.

In answer to the second question, inasmuch as the defendant cannot be rearrested to serve the sentence, this question must be answered in the negative.

In answer to the third question, section 921.15, Florida Statutes, 1941, says, in part: ". . . such bail shall be by bond . . . to be approved by the court, if in session at the time; otherwise by the sheriff or the other officer charged with the execution of the judgment."

#### INQUESTS OF THE DEAD

June 11, 1948.—048-195.

#### CORONER'S JURY—VERDICT—DEGREE OF MURDER

QUESTION: Where a coroner's jury is duly impanelled and finds that the deceased was murdered, does such jury have the power to render a verdict setting forth the degree of such murder?

*To Honorable J. O. Buck, Justice of the Peace, District No. 2, Orange County, Apopka, Florida:*

"At common law the verdict of a coroner's jury can be used for prosecuting the offenders without and instead of an indictment by a grand jury. In the United States, under modern statutes, however, the finding of the jury is merely advisory to the public authorities charged with the administration of the criminal law." (13 Am. Jur., Coroners, paragraph 12, page 113.)

In Florida such a verdict is only advisory.

Inasmuch as in Florida such a verdict is only advisory, and reading in pari materia sections 936.08, 936.12 and 936.15, Florida Statutes, 1941, it is my opinion that the coroner's jury has the power and, in many instances, it might be advisable for them to set forth in their verdict, if they find that a murder has been committed, the degree of such murder.

## APPEALS

October 15, 1948.—048-325.

### CUSTODY OF PRISONER PENDING APPEAL—STAY OF EXECUTION

QUESTION: Where a person convicted of a noncapital felony commences the service of his sentence in the state prison, and thereafter takes an appeal to the Florida Supreme Court from his conviction, and the trial court thereafter makes an order requiring the superintendent of said prison to keep said prisoner in custody without executing the sentence, to abide the judgment on appeal, should the prison superintendent comply with said order, or should he return the prisoner to the sheriff of the county from which he was committed, to await the outcome of the appeal?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

The appeal transcript now on file in the Florida Supreme Court shows that the sheriff of Palm Beach county delivered a state prisoner, Ewell Carver to Mr. P. D. Fancher, Jr., state representative, on March 16, 1948, and that Carver did not file his notice of appeal until April 29, 1948. This indicates that Carver had already started serving his sentence before the sentence was stayed by the taking of the appeal.

Circuit Judge, C. E. Chillingworth's order was evidently based upon sections 924.14 and 924.21, Florida Statutes, 1941. Section 924.14 provides that the execution of a sentence, other than death, is stayed upon the taking of an appeal; and section 924.21 provides that if execution of a sentence is stayed, but the defendant is not at large on bail, the official in whose custody he is, shall, upon receiving notice of the stay of execution, keep him in custody without executing the sentence, to abide the judgment on appeal.

The order being in line with the statutes, my advice is that the prison superintendent hold Carver in custody, without executing the sentence, to abide the judgment on appeal; subject, however, to the provision in the order that Carver may be released on bail upon the making of a \$5000.00 supersedeas bond in accordance with law.

However, since Carver had commenced serving his sentence before it was stayed by the appeal, section 924.22 gives him the option of serving his sentence during the pendency of the appeal, at his request. Therefore, if he should notify the commissioner of agriculture or the prison officials that he wishes to serve on his sentence while his appeal is pending, he should be permitted to do so and, in such case, he should receive credit on his sentence for the time served during appeal. Also, a record should be made of the matter for future reference.

## PROVISIONS SUPPLEMENTAL TO CRIMINAL PROCEDURE LAW

August 26, 1948.—048-281.

PRELIMINARY HEARING—MINOR—NOTICE TO  
PARENT OR GUARDIAN

QUESTION: Does section 932.38, Florida Statutes, 1941, require a magistrate to give notice to the parent or guardian of a minor of a criminal charge against said minor prior to the magistrate's conducting a preliminary hearing of same?

*To Honorable Chester B. McMullen, State Attorney, 6th Judicial Circuit, Clearwater, Florida:*

Section 932.38, Florida Statutes, 1941, reads as follows:

"When any minor, not married, may be charged with any offense and brought before any of the courts, including municipal courts, of this state, due notice of such charge prior to the trial thereof shall be given to the parents or guardian of such minor, provided the name and address of such parent or guardian may be known to the court, or to the executive officers thereof. In the event that the name of such parent or guardian is not known or made known to the court or executive officer or cannot be reasonably ascertained by him, then such notice shall be given to any other relative or friend whom such minor may designate.  
. . ."

It will be noted that the statute requires notice to be given prior to the trial thereof.

A preliminary hearing is not a trial. (*Burall v. Johnston*, D. C. Cal., 53 Fed. Supp. 126, 129.) A preliminary hearing before magistrate is not a trial. (Code Cr. Proc. section 208. *People on Information of Plate v. Ehrlich*, 14 N.Y.S. 2d 125, 128.) Deprivation of counsel at examination before commissioner did not constitute ground for granting habeas corpus, since a preliminary hearing is not a trial within the constitution, but is an ex parte proceeding. (*Burall v. Johnston*, C. C. A. Cal., 146 F. 2d 230.)

A preliminary hearing before a magistrate is not a criminal prosecution or trial within constitutional guaranty of right to counsel, since purpose of hearing is to determine whether a crime has been committed and whether there is probable cause to believe that accused committed it. (*Roberts v. State*, 17 N.W. 2d 666, 668, 145 Neb. 658.)

In the case of *Shepherd v. State*, 119 So. 866, the Florida Supreme Court has held that notice to parent or guardian of a minor of the proceedings against a minor before a county judge on charge of bastardy is not essential under said section 932.38, Florida Statutes, 1941, since the hearing in question was merely a preliminary investigation to determine whether a defendant should be held for trial in the circuit court.

These opinions force me to the conclusion that in a case of preliminary hearing before a magistrate, such notice to the minor's parent or guardian is not required.

However, if the committing magistrate is informed that a minor desires to enter a plea of guilty to the charge, I feel that such committing magistrate, in fairness and justice to the said minor, should notify the parent or guardian of the charge against said minor prior to said preliminary examination.



August 6, 1948.—048-262.

SUPERSEDEAS BOND—DEFENDANT REMANDED—  
SUPREME COURT

QUESTIONS: John Doe was convicted of a felony; sentenced to the state prison at Raiford for five years; he appealed his case to the Supreme Court of Florida; was released from custody on supersedeas bond; the supreme court affirmed the conviction of the trial court and issued its mandate to said court. 1. Whose responsibility is it to notify John Doe that the supreme court has affirmed the case and the mandate received?

2. After John Doe is so notified, and he does not appear at the next term of court in which the case was originally determined, what procedure must then be followed?

*To Honorarble R. L. Kendrick, Sheriff of Escambia County, Pensacola, Florida:*

A supersedeas bond in such case is, after approval, filed with the clerk of the court which rendered the judgment (section 920.02, Florida Statutes, 1941). The mandate which is issued by the supreme court is sent to the clerk of the court rendering the judgment and said mandate is filed and recorded by the said clerk.

I know of no law requiring notice to be given to John Doe of the action of the supreme court and the filing and recording of the mandate, for, as a matter of fact, the said John Doe is charged with knowledge of the action of the said supreme court, and it is his duty to keep informed thereof. However, inasmuch as the clerk has the bond in his possession and also has knowledge of the filing and recording of the mandate, I think it would be an act of courtesy for him to notify John Doe and his sureties on the said supersedeas bond of the action of the supreme court.

If the said John Doe, after the going down of the mandate, does not appear at the next term of the court in which the case was originally determined, as provided in the said bond (I assume that this condition is in the said bond, as it ordinarily should be), then I think that the procedure as set forth in sections 932.45 and 932.46, Florida Statutes, 1941, should be followed, provided, of course, the bond is one which is applicable to the said sections. If the bond is a cash bond, the said court can declare the cash forfeited.

I think it would be the duty of the clerk and well within province of the sheriff to call the court's attention to the fact that the conditions of the supersedeas bond had been broken by the defendant so that the judge could take the proceedings as set forth, supra.

The estreatment of the bond does not discharge the defendant, and it would then be in order for the court to issue a bench warrant for the arrest of said defendant should that become necessary.

SEARCH WARRANTS

May 22, 1948.—048-173.

AUTHORIZATION—ISSUANCE—MAYORS—MUNICIPAL JUDGES

QUESTIONS: 1. Does the mayor of the City of Bonifay have authority to issue a search warrant to be served within the city limits?

2. Where a search warrant is issued by the county judge, can it be served within the city limits of Bonifay by the chief of police?

*To Honorable J. L. Kirkland, Mayor, Bonifay, Florida:*

(1) Section 933.01, Florida Statutes, 1941, specifies the officers by whom search warrants may be issued. It permits only the judges named therein to issue search warrants, and does not authorize mayors to issue them. It is true that said mayor performs the same duties in general as are performed by municipal judges, but the supreme court has held in the case of *Hart v. State*, 103 So. 633, that even municipal judges cannot issue search warrants. The supreme court has also held in the case of *State ex rel. Wilson v. Quigg*, 17 So. (2d) 697, that a search warrant cannot be issued for the violation of a municipal ordinance. The first question must be answered in the negative.

(2) Section 933.07, Florida Statutes, 1941, prescribes that search warrants shall be issued "to any sheriff and his deputies or any constable, police officer or other person authorized by law to execute process." Therefore, when a search warrant is to be served in the City of Bonifay, it is my opinion that the county judge has the right to issue it to any police officer of said city and that such police officer has the power to serve it within the city limits. I point out, however, that the county judge issuing the search warrant must make it returnable before himself or some other state court having jurisdiction of the offense, and it cannot be made returnable before a municipal court. (Section 933.07, Florida Statutes 1941; *State ex rel. Wilson v. Quigg*, 17 So. (2d) 697.)

Please note that this opinion deals only with the general statutes governing the issuance and service of search warrants, and with supreme court decisions construing such general statutes. Of course, as was decided in *Farragut v. City of Tampa*, 22 So. (2d) 645, the Legislature can enact special laws conferring power upon municipal courts to issue search warrants in aid of the enforcement of municipal ordinances, and, if there be any such special law conferring that power upon the mayor of Bonifay, then such special law will govern.

August 7, 1947.—047-245.

#### CONSTABLE—ADJOINING DISTRICT—AUTHORITY TO SERVE WARRANT

QUESTION: What is the authority of a constable to serve a search warrant issued by the county judge in the same county but in an adjoining district where there is no justice of the peace or constable, for such district?

*To Honorable Leo Kirkland, Constable, Graceville, Florida:*

I call attention to section 933.07, Florida Statutes, 1941, which provides:

"The judge or magistrate, upon examination of the application and proofs submitted, if satisfied that probable cause exists for the issuing of the search warrant, shall thereupon issue a search warrant signed by him with his name of office, to any sheriff and his deputies or any constable, police officer or other person authorized by law to execute process, . . ."

and to section 36.11, Florida Statutes, 1941, which provides as follows:

"The sheriff of the county or any constable shall be the executive officer of the county judge's court, but if the sheriff or constable shall for any reason be disqualified or unable to act, the county judge may appoint any individual, not interested in the case on trial, to serve process and perform all duties of such executive officer."

and also to section 37.16, Florida Statutes, 1941, which provides as follows:

"The sheriff or any constable of the county shall be the executive officer of the courts of justice of the peace but if the sheriff or constable shall, for any reason, be disqualified or unable to act, the justice of the peace may appoint any individual, not interested in the case on trial, to serve process and to perform all duties of such executive officer. Any constable of the county in which the process issued may serve the process of the county judge's court and justice of the peace courts in any district of said county where the same may be lawfully served, provided he shall not be entitled to greater mileage in any case in serving writs from courts of justice of the peace than he would be if the writ issued from such court in the district in which such constable resides and for which he was elected."

I am unable to find any other provisions in the statutes that might be considered as extending the jurisdiction of the constable as to the service of process beyond the territorial limits of his own district, and I am unable to find any court decisions which would throw any light on the particular question at hand. It is generally held that the jurisdiction of an officer, unless otherwise provided by law, is limited to the territorial confines of his district. However, it may be argued from the provisions of the quoted sections of the statutes that it was intended that a constable may serve a process of a county judge's court in any part of the county. But I am of the opinion that the provisions of the statute are not clear enough to warrant me to render an official opinion holding whether or not a constable can do so without an expression from the courts, and I believe that this question is of sufficient importance that a declaratory decree should be secured before a constable should serve a process, particularly in the nature of a search warrant, in any district other than his own district.

## COSTS

September 12, 1948.—047-294.

### ARRAIGNMENT—TIME FOR COLLECTING FEE— COUNTY JUDGE'S FEES

QUESTIONS: 1. If a person is brought before a county judge on a criminal charge and he is arraigned before said judge, and a bond is set by said judge for this person to appear at the next term of circuit court, is the judge entitled to his fees then or does he have to wait until he has been tried in circuit court before he can collect his fees?

2. If a person has been arraigned before said judge and a bond set for said person to appear at the next term of circuit court and the case is thrown out of court, is the judge entitled to his fees?

*To Honorable W. W. Brown, County Judge, Baker County, Macclenny, Florida:*

Section 939.14, Florida Statutes, 1941, reads as follows:

"When a committing magistrate holds to bail or commits any person to answer a criminal charge in a county court, a criminal court of record, or a circuit court, and an information is not filed nor an indictment found against such person, the costs of such committing trial shall not be paid by the county, except the costs for executing the warrant."

With reference to the first question, in the light of the quoted section, *supra*, as a practical matter, the county judge should not be paid his fee

until an information has been filed and an indictment found against a party accused; otherwise, the county commissioners would not know whether the said judge was entitled to a fee. As soon as an information is filed and an indictment found, I think the payment of the judge's fee would be in order.

As to the second question, if the term "thrown out of court" means that no information is filed or indictment found, in view of the foregoing quoted section, the county judge would not be entitled to a fee as committing magistrate.

### EXECUTIVE CLEMENCY

February 5, 1947.—047-31.

#### COPY OF INFORMATION—AFTER TRIAL—COST

QUESTION: May a defendant have copies of the information and/or judgment and sentence after conviction without cost to him or to the county wherein he was convicted? If so, should these copies be certified copies?

*To Honorable Chas. E. Limpus, Clerk, Criminal Court of Record,  
Orange County, Orlando, Florida:*

I find only one instance which requires a copy of the indictment or information to be furnished without cost to a party convicted of crime and that is where such party applies for remission, commutation, or pardon (see section 940.04, Florida Statutes, 1941). While the statute does not so state, I think the party so convicted is entitled to a certified copy of said indictment or information.

Of course, the party charged with crime is to be furnished a copy of the indictment or information without cost before trial (see section 11 of the Declaration of Rights of the Constitution of Florida, and section 906.28, Florida Statutes, 1941).

I find no law requiring copies of judgment and sentence to be furnished without cost to the party convicted.

### UNIFORM INTERSTATE EXTRADITION

June 26, 1948.—048-214.

#### PRISONERS OF ANOTHER STATE—CONFINEMENT EN ROUTE

QUESTION: Where an officer of another state is transferring a prisoner from Florida to that state to answer criminal charges, does such officer have the right to necessarily confine such prisoner overnight, or a day or two, in the jail of a Florida county through which he may be passing, without an order from any court, magistrate or other officer of the county in which the jail is located?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

It appears that the answer to this question is to be found in the uniform interstate extradition act, being chapter 941, Florida Statutes, 1941.

The first paragraph of section 941.12 provides that:

"The officer or person executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the



prisoner until the legal sufficiency of his arrest has been determined by the court and the officer or person having charge of him is ready to proceed on his route, such officer or person shall pay the jailer holding the prisoner, the costs of his jailing and keeping."

Said quoted provision gives the agent of the demanding state to whom a prisoner has been delivered after being arrested in Florida, the absolute right, when necessary, to confine the prisoner at such agent's expense in the jail of any county through which he may pass, without any order from any court, magistrate or other officer.

August 13, 1948.—048-270.

#### NON-SUPPORT OF MINOR CHILD—PREPARATION OF EXTRADITION REQUEST

QUESTION: To what office or officer should complainants be referred who wish to resort to the necessary extradition proceedings to have their husbands or former husbands returned to Florida for the felony of withholding the means of support from their minor children?

*To Honorable Russell W. Cummings, Assistant Probate Officer of Duval County, Jacksonville 2, Florida:*

It appears from the letter presented that the foregoing question is based upon the following facts:

(a) It is a statutory function of the registry of the Juvenile Court of Duval County, under the provisions of chapter 21855, Laws of Florida, acts of 1943, when directed by the circuit court, to collect and disburse funds which are to be paid under orders of that court for the support of children.

(b) It is also a daily function of the judge of the juvenile court as committing magistrate to accept complaints, and sometimes issue warrants, against husbands and fathers for the non-support of their children, and to arrange for payments to be made through the registry for the benefit of such children when there is separation of parents, but no divorce or legal separation involved.

(c) Frequently the juvenile judge's office is confronted with a situation, in both the circuit court cases and in juvenile court non-support cases, where the father has left this state. It is stated that in both cases the assistant probate officer's hands are tied, and that he is unable to assist the mother or custodian of the children in obtaining support for the minors.

Section 941.23, Florida Statutes, 1941, reads in part, as follows:

"When the return to this State of a person charged with crime in this State is required, the bailiff or state attorney or county solicitor or other prosecuting attorney shall present to the Governor his written application for a requisition for the return of the person charged . . . and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim."

The crime of non-support of a minor child is a felony in this state (section 856.04), Florida Statutes, 1941), and if committed in the County of Duval, would be tried in the Criminal Court of Record of Duval County.

Under chapter 21855, Laws of Florida, 1943, when the circuit court orders payment of support money for a minor child and default is made therein, such default is made known to the circuit court.

Said section 941.23 seems to indicate that either the state attorney or the prosecuting attorney of the criminal court of record might sign application for extradition, but ordinarily the prosecuting attorney of the court which has jurisdiction to try the case prepares such application for extradition and the necessary papers to accompany same.

## CHAPTER XXXIX

### CORRECTIONAL SYSTEM

#### PAROLE

November 1, 1947.—047-371.

#### FOREIGN PAROLEES—ARREST BY FLORIDA OFFICERS

QUESTIONS: 1. When parolees and probationers of another state are permitted to reside in Florida under a compact entered into by Florida with such state under authority of chapter 949, Florida Statutes, 1941, do the supervisors of the Florida Parole Commission have authority to arrest such parolees and probationers for violations of the terms upon which they were placed on parole or probation in such other state?

2. If the answer to Question 1 is in the negative, are the supervisors of the Florida Parole Commission authorized to apply for and obtain a fugitive warrant for such parolees and probationers if the latter violate the terms upon which they were placed on parole or probation in such other state?

*To Honorable Francis R. Bridges, Jr., Chairman, The Florida Parole Commission:*

In my opinion, the answer to question 1 must be in the negative.

Chapter 949, Florida Statutes, 1941, authorizes Florida to enter into compacts with other states under which the parolees and probationers of such other states may be permitted to reside in Florida. The compact with other states provides:

“(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.”

but this provision goes no further than to authorize visitation and supervision, which does not include arrest.

I find nothing in chapter 949, or elsewhere, which would authorize a Florida Parole Commission supervisor to arrest a parolee or probationer from another state for violation of the terms upon which he was placed on parole or probation.

Sections 947.22 and 947.23, Florida Statutes, 1941, do not apply because they refer to parolees who have been paroled in Florida. These sections provide that, when a parolee is arrested by a parole supervisor on a charge of violating his parole, he shall be carried before the commission and given a hearing on the charge and that, if the charge is sustained, the commission may revoke his parole and return him to prison to serve the balance of his sentence. Manifestly, it is not the intent of these sections to give the Florida Parole Commission power to revoke a parole granted by another state and to return the parolee to prison in that other state. So, these sections must be construed to apply only to persons paroled by the Florida Parole Commission.

Chapter 948, Florida Statutes, 1941, authorizes “The courts of the State of Florida” to grant probation, and requires that, when a person placed on probation is believed to have violated his probation in a material

respect, any parole or probation officer may, within the period of probation, arrest him without warrant and return him to the court granting the probation, for a hearing. It is apparent that this chapter applies only to persons placed on probation by a Florida court.

The compact authorized by chapter 949 appears to contemplate that the state in which the parole or probation is granted shall do its own arresting of its parolees and probationers. Said compact provides that:

"(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense."

Thus the other state is given blanket authority to send its duly accredited officers into Florida to apprehend and retake any parolee or probationer of such other state, without resorting to extradition. There is no limitation upon this broad power except when the parolee or probationer is charged with, or suspected of, having committed a crime in Florida.

Section 941.13, Florida Statutes, 1941, dealing with extradition, provides that:

"Whenever any person in this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state, . . . or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, . . . and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein. . . ."

A Florida Parole supervisor or any other credible person can procure a fugitive warrant under said statute for a parolee or probationer from another state who breaks the terms upon which he was paroled or put on probation in that state.

However, the making of such an affidavit and the procuring of such a warrant are steps in the extradition proceedings provided by chapter 941. Therefore, if a Florida Parole supervisor should follow such a course, it is my opinion that the person against whom the warrant is obtained would have to be extradited, unless he should waive extradition. It does not appear that there would ordinarily be any good reason for pursuing such a course, which would require extradition unless waived, when the compact provided by chapter 949 permits the other state to send its duly accredited officer into Florida and retake the parolee or probationer without the necessity of extradition. Moreover, if a warrant were taken out without any request therefore from the other state, it might develop that the authorities of that state would not be sufficiently interested to go through with extradition proceedings.



March 5, 1948.—048-79.

#### DEPOSIT OF FUNDS—CONDITIONS OF PAROLE

QUESTIONS: 1. Does the Parole Commission have authority to require an individual, who is being considered for parole, to deposit funds to be used for transportation expenses in the event of violation of his parole?

2. Where should the funds be kept, if a deposit is authorized?

*To Honorable Francis R. Bridges, Jr., Chairman, Florida Parole Commission:*

In my opinion said board has the authority to require such a deposit. (Section 947.20, Florida Statutes, 1941.)

In my opinion, if such funds are required, it would be advisable to deposit same with the state treasurer, to be kept there by him in a special fund for the purpose of use, in case the parole is violated, or to return to the parolee, in case there is no violation of his parole.

#### CONVICTS

August 27, 1948.—048-280.

#### COUNTY CONVICTS—SEPARATE SQUADS—WHITE AND COLORED

QUESTION: Does the law prohibit the working of white county prisoners and colored county convicts in the same squad on the county roads?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

Section 952.07, Florida Statutes, 1941, requires that white and negro state convicts be worked upon the public roads only in separate squads, but I find no statute imposing any such requirement as to county convicts.

However, section 951.01, Florida Statutes, 1941, provides as follows:

"... County convicts shall be kept and worked under such rules and regulations and supervisions as may be prescribed by the commissioner of agriculture, with the advice and approval of the board of commissioners of state institutions, and the commissioner of agriculture, with the approval of the board of commissioners of state institutions, may enforce all such rules and regulations. Upon the failure of any person in charge of said county convicts to comply with such rules and regulations, the commissioner of agriculture, with the approval of the board of commissioners of state institutions, may require the discharge of such person."

and it is my opinion that under the authority of said statutory provision, the commissioner of agriculture, with the advice and approval of the Board of Commissioners of State Institutions, may prescribe a rule or regulation prohibiting white and negro convicts from being worked upon public roads in the same squad.

#### STATE PRISON FARM

November 14, 1947.—047-379.

#### GAIN TIME STATUTE—CONDITIONAL RELEASE— STATE PARDON BOARD

QUESTION: Under the circumstances and conditions outlined herein-after, should Mr. X be released from the state prison?

*To Honorable Nathan Mayo, Commissioner of Agriculture:*

In 1929, "X" was sentenced to serve 25 years in the state prison for armed robbery. On January 1, 1941, he was released under conditional pardon and, following the revocation thereof, was returned to the state prison in May, 1947. His 25-year sentence has since been adjudged void because in excess of the maximum of 20 years authorized by applicable statute, and a sentence of 20 years has been imposed in lieu thereof. Under the method of computing gain time which was formerly employed, "X" would have been unconditionally released before said conditional pardon was granted, if his original sentence had been only 20 years. Under the method of computing gain time prescribed by the Florida Supreme Court in *Brown v. Mayo*, 23 So. 2d 273, he is not yet entitled to be released.

The gain time statute in force when "X" was granted a conditional pardon, under which the commissioner of agriculture would have released him prior to said conditional pardon if his original sentence had been only 20 years, was chapter 19199, acts of 1939, which made the same provision for gain time for state prisoners as had been made by chapter 18065, acts of 1937.

Said chapter 19199 has been brought forward as section 954.06, Florida Statutes, 1941.

So, the gain time law construed by the Florida Supreme Court in 1945 in *Brown v. Mayo*, 23 So. 2d 273, i. e., section 954.06, Florida Statutes, 1941, is the same gain time law under which "X" would have been released prior to his conditional pardon if his original sentence had been only 20 years.

The law has not changed. Rather, construction of it has been superseded by the construction placed upon it by the Supreme Court of Florida, in *Brown v. Mayo*.

The supreme court's construction is authoritative and controlling, and since, under that construction, "X" is not yet entitled to be released, it is my opinion that said commissioner is not authorized to release him and should not undertake to do so. However, the Board of Pardons has full power to rectify any inequality between "X" and prisoners released by a former interpretation of the gain time law.

**FLORIDA INDUSTRIAL SCHOOL FOR BOYS**

December 3, 1947.—047-401.

**DELINQUENT CHILD—DISPOSITION OF DELINQUENTS**

**QUESTIONS:** In 1933, when Johannes Peterson was 17 years of age, he committed and was convicted of breaking and entering with intent to commit petit larceny, in Escambia county, Florida. 1. Was he a "delinquent child" under the law in force at that time?

2. Did the law require that his sentence be to the Florida Industrial School for Boys, or was he subject to being sentenced to the State prison?

*To Honorable C. M. Powell, Immigrant Inspector, United States Department of Justice, Immigration and Naturalization Service, Pensacola, Florida:*

1. The law in force in 1933 with reference to "delinquent children" was chapter 36, Compiled General Laws of Florida, 1927. Section 3684 was a part of said chapter.

Said section 3684 defined the term "delinquent child," and provided that chapter 36, which included said section, should apply "only to children less than seventeen years of age." It is indicated that Johannes Peterson

was already 17 years of age when he committed and was convicted of the crime of breaking and entering with intent to commit petit larceny in 1933, and, this being so, he was not a "delinquent child."

2. Since Peterson was under the age of eighteen years when he was convicted, and since his offense was not punishable by life imprisonment, section 8644, Compiled General Laws of Florida, 1927, gave the trial court the option of sentencing him to either the State prison or the Florida Industrial School for Boys.

May 7, 1947.—047-127.

#### PRELIMINARY HEARING—RELEASE TO COUNTY

QUESTION: What procedure, if any, is required of the Board of Commissioners of State Institutions for the temporary release to a proper officer of an inmate of Florida Industrial School for Boys for attendance of such inmate at his preliminary hearing before a justice of the peace on a criminal charge?

*To Honorable J. E. Straughn, Board of Commissioners of State Institutions:*

The letter and enclosures are not clear concerning the circumstances of the commitment of this boy to the industrial school and the charge now pending against him in Hillsborough county. If this boy was committed to the Industrial school in connection with the alleged crime now charged against him in Hillsborough county, in my opinion he should not be delivered for preliminary hearing as requested; otherwise, it seems that, properly, the board may authorize his delivery to the sheriff of Hillsborough county for the purpose requested. Just what these facts are, may be ascertained by inquiry.

If, after ascertaining the facts in this case it seems proper, in the light of the foregoing, to deliver the boy to the sheriff for preliminary hearing as requested, the board may so notify the superintendent, with instructions that the superintendent deliver the boy to the sheriff with the understanding that the sheriff shall safely keep said boy in custody, and upon completion of said preliminary hearing, whether or not said boy is bound over by such court on any or all of the charges, to return the boy to the institution in Jackson county, all costs in connection therewith to be borne by Hillsborough county. It is specifically noted that this opinion is limited to the situation here mentioned.

## CHAPTER XL

### CONSTITUTION OF FLORIDA

#### DECLARATION OF RIGHTS

April 22, 1947.—047-118.

##### RIGHT TO WORK—RESTRICTIONS

**QUESTION:** Is it unlawful for an employer, as a condition precedent to employment, to require employees to become insured under a group insurance plan covering such employees (both life insurance and hospitalization), the employer deducting from the employee's pay check a part of the premium due by the employee for such insurance, the employer paying balance of such premium?

*To Honorable J. Edwin Larson, Insurance Commissioner:*

In my opinion the question is answered as follows:

There appears to be ample constitutional limitation in the Florida Declaration of Rights against an employer's restricting the citizens' right to work by any such requirement.

#### LEGISLATIVE DEPARTMENT

March 31, 1947.—047-83.

##### RETROACTIVE LAW—EFFECT OF APPROPRIATION

**QUESTION:** When must the transfer of funds appropriated by the 1945 Legislature for tuberculosis sanatoriums be made?

*To the State Tuberculosis Board, Orlando, Florida:*

The request for opinion quotes the following:

"The 1945 session of Legislature passed a bill providing for an appropriation of 2½ million dollars for the construction and equipment of tuberculosis sanatoriums in this state. The bill further provided that these funds shall be transferred to the credit of the 'Florida Tuberculosis Board Construction and Equipment Fund' in the following sums on the hereinafter mentioned dates, to-wit: \$750,000 on or before December 31, 1945, \$750,000 on or before July 1, 1946, \$1,000,000 on or before March 1, 1947. The bill was expressly vetoed by the governor after the adjournment of the Legislature. Assuming that this bill will be laid before the Legislature at its coming session, pursuant to the provisions of section 28, article III, Florida Constitution, and that the bill will receive the necessary vote of approval thereon to again pass both houses of the Legislature and that there are sufficient funds in general revenue available for the transfer, when must the transfer of funds take place?"

I am familiar with the rule of statutory construction regarding retroactive operation of a statute, but where the statute so clearly expresses the time for the doing of an act, the general rule of law that statutes will not be given retroactive effect is not applicable. If the assumed facts do occur, the effect of the bill would be an appropriation forthwith of 2½ million dollars.



## JUDICIAL DEPARTMENT

January 29, 1948.—048-19.

### JUSTICE DISTRICTS—CHANGE IN DISTRICTS

**QUESTION:** Do the county commissioners now have the right to alter or change justice of the peace districts in view of the amendment to the constitution, to-wit, article V, section 21, which seems to give that power to the Legislature?

*To Honorable Frederick M. Mills, DeLand, Florida:*

In my opinion section 21 of article V of the Constitution of Florida took from the county commissioners the power theretofore vested in such board to change, alter, establish or abolish such districts and conferred that power on the Legislature.

I therefore answer the question in the negative.

## COUNTIES AND CITIES

June 14, 1947.—047-162.

### COUNTY COMMISSION DISTRICTS—CREATION

**QUESTION:** Are the county commissioners of the several counties of the state required at any time to create new commissioners' districts according to population, or is such a duty optional with said county commissioners?

*To Honorable John H. Treadwell, Jr., Attorney for the Board of County Commissioners, DeSoto County, Arcadia, Florida:*

Section 5, article VIII, of the Constitution of Florida, says:

"There shall be one county commissioner in each of the five county commissioners' districts in each county, which districts shall be numbered one to five inclusive, and shall be as nearly as possible equal in proportion to population."

I cannot see where the county commissioners have any option in the matter since the opinion of the supreme court in the case of *Prince et al. v. State ex rel. Williams*, was rendered on the 22d of February, 1946, and cited in 25 So. (2d) 5. In that opinion the court said:

"Mandamus will lie to coerce the performance of the duty imposed upon the board of county commissioners to divide the county into five commissioners' district as nearly as possible equal in population."

Further on in the opinion the court said:

"It is true that such boards (county commissioners) may exercise a reasonable discretion but that discretion must be exercised within the terms of the constitution and the board cannot disregard the mandate of the constitution requiring that such districts must be created with a view to equality in population."

## HOMESTEAD AND EXEMPTION

January 30, 1947.—047-26.

### SPECIAL SCHOOL DISTRICT BONDS—LIABILITY

**QUESTION:** Are homesteads up to the assessed valuation of \$5,000 exempt from taxation for special tax school district bonds issued under

authority of article XII, section 17 of the constitution and voted upon in the year 1946, which bonds are not issued for special benefits?

*To Honorable A. H. Armstrong, F. T. A. A. F., Madison, Florida:*

Article X, section 7, Constitution of Florida, says:

"Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property as defined in article 10, section 1, of the Constitution, for the year 1939 and thereafter. . . ."

Such homesteads are not taxable for said special tax school district bonds. (*Fleming v. Turner*, 165 So. 359.)

February 14, 1947.—047-61.

#### JOINT OWNERSHIP—SEPARATE HOMESTEADS—LIMITATIONS

QUESTIONS: 1. Where partners own a tract of land upon which are located several dwellings, which partners occupy separate of said dwellings, are they each entitled to homestead exemption, when title is held in the name of all the partners?

2. Where partners own a tract of land upon which are located several dwellings, which partners occupy separate of said dwellings, are they each entitled to homestead exemption when title is held in the name of less than all of the partners or in the name of a third person?

3. If homestead exemptions may be claimed by any or all of the partners as aforesaid, what area and what amount of value may be claimed by each partner?

4. If homestead tax exemptions may be claimed by any or all of the partners aforesaid, will the fact that such lands may be located within or without an incorporated municipality affect the area that may be claimed by each partner?

*To Honorable C. M. Gay, State Comptroller:*

Under section 7, article X of the Florida Constitution, title to the homestead may be "held by the entireties, jointly or in common with others, and said exemption may be apportioned, among such of the owners as shall reside thereon, as their respective interest shall appear." The title to such property may be "the legal title or beneficial title in equity to real property in this state." The exemption to be allowed is limited to \$5,000.00 "to any one person or any one dwelling house," and the amount of the exemption to any one person may not exceed the value of his interest in the property. The area of the exempted homestead is prescribed by section 1, article X of the state constitution.

Under said section 1, article X of the state constitution, the exempted homestead may extend to 160 acres of land outside of incorporated municipalities or to one-half acre within incorporated municipalities; however, the exemption in incorporated municipalities "should not extend to more improvements or buildings than the residence and business house of the owner."

The interest of partners in partnership property, although it has many of the characteristics of an estate in common and of joint tenancy or cotenancy, is neither that of joint tenants, tenants in common or cotenants. Each partner in equity is possessed of a joint interest in the whole, but does not own any separate part, and each has an undivided interest in the

partnership property only after the debts are paid. The interest in the property has been said to be "sui generis" or of its own kind and class. (40 Am. Jur. 129, section 5.) Under the common law, real estate must be held by two or more persons either as joint tenants, coparceners or tenants in common, so that title to the partnership real property could not be held by the partnership as a separate entity (40 Am. Jur. 191 and 192, section 90), but as joint owners or tenants in common (40 Am. Jur. 192 and 195, sections 90 and 96; 47 C. J. 758, section 191). The interest of a partner in the firm assets has been said to be the share he will be entitled to after claims against the firm have been satisfied and the equities and accounts between the partners have been adjusted; it has been said to be a mere chose in action (47 C. J. 780 and 781, section 221). However, the interest is such that it may be seized under legal process, mortgaged or sold (47 C. J. 781 and 782, section 221; 40 Am. Jur. 268, 421 and 447, sections 199, 421 and 455). In the case of *Tattershall v. Nevels*, 77 Nebr. 843, 110 N. W. 708, a member of a partnership owning real property was held to be a freeholder.

Realty acquired in partnership business for partnership purposes is deemed partnership property in equity, although title is taken in the name of one of the partners or in the name of some third person (*Proctor v. Hearne*, 100 Fla. 1180, 131 So. 173, *Claffin v. Ambrose*, 37 Fla. 78, 19 So. 628). Although a conveyance of real property to partners vests title in them as cotenants at law, in equity such title is treated as vesting in them in their partnership capacity and a conveyance to one of the partners is treated as a trust for the partnership (40 Am. Jur. 195, section 96; 47 C. J. 760-763, section 193). Where land is bought by members of a partnership with funds of the partnership, and title is taken in the name of one of the partners, an implied trust arises in favor of the partnership "and the members become equitable owners and equitable tenants in common of the land." (*Roach v. Roach*, 143 Ga. 486, 85 S. E. 703; *McDonald v. Dabney*, 161 Ga. 711, 132 S. E. 547. See also *Wilson v. Wilson*, ..... Mont. ...., 210 P. 896 and *Chicago, B. & Q. R. Co. v. First National Bank*, 58 Neb. 548, 78 N. W. 1064.)

Homesteads in partnership property have been allowed in many states, and especially in those states, such as this state, where real estate purchased with partnership funds and taken in the name of the partners is deemed in law to be held by the partners as tenants in common. (40 C. J. S. 528, section 89; 29 C. J. 850, section 171; 26 Am. Jur. 40, section 64.) "It is generally held that an equitable interest is enough to support the homestead claim." (*Beal v. Pinckney*, CCA Fla., 150 Fed. 2d. 467, 161 A. L. R. 1281.) A cestui que trust who occupies his property is usually held to be entitled to claim a homestead exemption therein. (40 C. J. S. 519, 521, sections 79 and 81; 26 Am. Jur. 37, section 58; Annotation in 89 A. L. R. 526.) The homestead exemptions under the constitution of this state apply to beneficial interests in real estate as owned by the claimant. The entire estate is not required to be vested in the claimant. See *Morgan v. Bailey*, 90 Fla. 47, 105 So. 143, text 144 and cases there cited.) Partners become equitable owners and equitable tenants in common of partnership lands when title is taken in the name of one of the partners or in the name of some third person. (See *Roach v. Roach*, and *McDonald v. Dabney*, supra.)

The extent of the homestead in area is limited to one hundred sixty acres of lands outside of incorporated municipalities and one-half acre within incorporated municipalities (section 1, article X, of the constitution); however, the homestead in an incorporated municipality may not extend to more improvements or buildings than the residence and business house of the owner. This limitation does not apply to homesteads outside of incorporated municipalities. The claim for homestead based upon an undivided interest in real estate will not extend the area allowed.

The value of the homestead is limited to five thousand dollars; however, this exemption may not exceed the value of the interest of the person claiming the homestead in the property if less than the entire interest.

From the foregoing statutes, constitutional provisions and authorities, I am of the opinion that the first and second questions should be answered in the affirmative; however, the consent of the remaining partners probably should be required to the application of a partner for tax exemption (see 40 C. J. S. 528, section 89).

Under the third question, each partner may claim an area not to exceed one hundred sixty acres outside of an incorporated municipality or one-half acre within an incorporated municipality, subject to the answer to the fourth question, and a value up to five thousand dollars but not in excess of the value of the interest of the owner.

Under the fourth question, outside of incorporated municipalities, there is no limitation upon the buildings and improvements that may be upon the property to be exempted; however, within incorporated municipalities only the dwelling and business house of the claimant may be included in the area claimed, other buildings and improvements and the lands upon which they are located may not be included although occupied by other partners who are themselves entitled to exemption as to their interests. Other undivided interests in the property not included in the homestead exemption should be taxed at their full cash value.

March 4, 1947.—047-65.

#### TOURIST QUARTERS—USE AS HOME

**QUESTION:** A person owns several acres of out-of-town property on which is located a dance hall which serves drinks and eats. He also has several tourist cottages for rent. This person eats in the dance hall and uses one of the tourist cottages in which to sleep and for personal belongings. Is this person, under Florida law, allowed the full \$5,000.00 homestead exemption, or only that part which is reserved for personal living quarters?

*To Honorable Fred A. Hoffman, Assessor of Taxes, Franklin County, Apalachicola, Florida:*

Article X, section 7, of the Constitution of Florida, says:

"Every person who has the legal title . . . to real property in this State and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on said home and contiguous real property as defined in article 10, section 1, of the Constitution. . . ."

Article X, section 1, of the Constitution of Florida says:

"A homestead to the extent of one hundred and sixty acres of land . . . owned by the head of a family residing in this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale. . . ."

"Section 1 of article 10 of the Constitution . . . does not limit such exemption to the dwelling house of the owner and the subsidiary buildings located on the land, but extends to the entire 160 acres, and the improvements on the real estate, when the land is actually occupied and lived on by the owner and head of the family and his family." (*Armour & Co., et al. v. Hulvey, et al.*, 74 So. 212.)



In my opinion, the person in question is entitled to the full \$5,000.00 homestead exemption as provided by the aforesaid sections of our constitution.

June 28, 1947.—047-187.

#### HOSPITAL BONDS—ROAD MAINTENANCE

QUESTION: Can taxes for road district maintenance, and bonds issued for county hospital be levied against homesteads?

*To Honorable John W. Booth, Assessor of Taxes, Alachua County, Gainesville, Florida:*

I assume that "road district maintenance taxes" are general taxes levied for the upkeep of roads in a certain district in Alachua county, and that "taxes for bonds issued for county hospital," means that these bonds were issued after the adoption of article X, section 7, of our constitution.

Article X, section 7, of the Florida Constitution, reads as follows:

"Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependant upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property as defined in article 10, section 1, of the Constitution, for the year 1939 and thereafter."

If my assumption is correct, I do not see how the taxes mentioned could be considered "assessments for special benefits."

In the case of *Groves v. Board of Public Instruction of Manatee County*, C.C.A., 109 F. 2d 522, the court said:

"This section is legally operative as to all taxes except for payment of public bonded obligations incurred before amendment was adopted."

Therefore, in my opinion, if the so-called road district maintenance tax was levied after the adoption of article X, section 7, and the bonds for county hospital were issued after the adoption of said article X, section 7, then the homesteads in the county would not be liable for said taxes.

April 7, 1947.—047-103.

#### ABANDONMENT OF PROPERTY—PROOF

QUESTION: If X, who is in the United States Navy (regular Navy), rents the property described below to another in the circumstances herein-after stated, is X entitled to homestead exemption for the year 1947?

*To Honorable C. M. Gay, State Comptroller:*

It is my understanding that in 1941 X purchased the property, consisting of land and the dwelling house thereon situated in Leon county, Florida, and obtained at that time the fee simple title thereto, which he still holds; that X, who is the head of a family, claimed, and was allowed, homestead exemption on said property for the years 1942 to 1946, inclusive; that after purchasing the property he occupied the dwelling house with his family intermittently until some time in 1945; that beginning some time in 1945 his duties in the Navy have necessitated his living out of the State of Florida and since that time his family also has lived out of the State of Florida in order to be with him; that neither he nor his family

has occupied the house since the latter date; that subsequent to the time that X and his family moved away from the house it was and has been rented to another on a month to month basis. I do not have sufficient information which would justify setting down here, as a basis for this opinion, the plans and intentions of X and his family with respect to said property at the time they removed themselves therefrom or for the future.

The character of property as a homestead depends upon the actual intention to reside thereon as a permanent place of residence, coupled with the fact of residence. I do not undertake to say here whether there was compliance with these requirements after the purchase of the property but, inasmuch as homestead exemption was allowed him from 1942 to 1946, inclusive, it will be assumed for the purpose of this opinion only that such requirements were met and that the property was X's homestead up to the time that he and his family left it and the State of Florida in 1945.

Once a homestead has been acquired, its character as such can be waived only by alienation in the manner provided by law or by abandonment. Since the property has not been alienated (the fee simple title still being held by X), the problem is reduced to a determination of whether there has been an abandonment of the homestead and, in this connection, whether the renting of the property to another on a month to month basis constitutes an abandonment.

The isolated fact that X has rented the property as aforesaid would not in itself constitute an abandonment or deprive the property of its homestead character (*Collins v. Collins*, 7 So. 2d. 443). Even absence for a long period of time is insufficient of itself to establish abandonment (40 C. J. S. 643, sec. 164 and case cited under note 80; also 40 C. J. S. 646, sec. 166 and cases cited under note 46). The question is really much broader and turns on whether, in the light of the facts delineated above (including the renting of the property), X intended an abandonment of the property as his homestead. Inasmuch as we are not advised of his intentions, and have no facts before us from which his intentions might be inferred, I cannot give a definite answer to be followed in this case but must be content to furnish a statement of the law, which will have to be applied to the facts as they actually are.

The Florida Supreme Court has held that it is the duty of the courts when considering statutes and constitutional provisions applicable to homestead exemptions to liberally construe the same in the interest of the family home, but these beneficent provisions should at no time be interpreted so as to make them instruments of fraud or unjust impositions on the rights of creditors. The homestead intended by the constitution to be exempt must be a place of actual residence by the head of a family and his family and the temporary absence of the head of the family for business reasons will not deprive the homestead of its status as such unless there has been a design of permanent abandonment. It is equally well settled, however, that a permanent abandonment of the homestead as a bona fide home and place of permanent abode strips it of its homestead character. A homestead is abandoned by taking up a permanent abode at a different place; when the owner removes from the home with no intention of returning, takes up his permanent abode at another place and pursues his livelihood there. Whether there has been an abandonment of a homestead so as to deprive it of its status as such under the constitution must be determined by a consideration of all the pertinent facts and circumstances of each case. (See *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d. 448 and *Barlow v. Barlow*, 23 So. 2d. 723.)

I regret that I am unable to give a specific response to the question, but I believe it will be agreed that in view of the foregoing, it is impossible for me to undertake to do so without having all of the pertinent facts and circumstances before me.

## EDUCATION

June 6, 1947.—047-147.

### COUNTY SCHOOL FUNDS—NON-EDUCATIONAL USE

**QUESTIONS:** 1. If a board of county commissioners promises money to non-educational projects such as a D.D.T. spraying program, on condition that a school board match their own outlay, can school money be used for such purposes from an existing budget? The source of the funds usually in question are racing commission funds allotted by local law to school boards, but might be from county or district taxes.

2. Can racing commission funds or any other school funds from county or district tax sources anticipated for schools be budgeted for future use for such non-educational projects?

*To Honorable Colin English, State Superintendent of Public Instruction:*

In answering the questions, I assume that the spraying program is a non-educational project, as stated in the question; in other words, that it is not a part of any school agricultural program authorized by the statutes.

School funds, from whatever source, may not be lawfully expended for anything except school purposes. See sections 9 and 13, article XII of the Florida Constitution.

Both of the questions are answered in the negative.

## LOCAL OPTION

February 20, 1947.—047-46.

### CITIES—SALE OF LIQUOR IN DRY COUNTIES

**QUESTION:** Does the Legislature of the State of Florida have the power to grant to cities the authority to engage in the sale of intoxicating liquors, wines or beer, if the cities are situated in counties in which the sale of such liquors, wines or beer is prohibited?

*To Honorable James T. Vocelle, Director, State Beverage Department:*

In answer to the question, consideration must be given to article XIX of the Constitution of the State of Florida, which relates to "Local option." I note, as pointed out in request for opinion that section 2 of such article directs the Legislature to "provide by general or special or local legislation laws to carry out and enforce the provisions of this article" and concludes with a sentence reading, "The power of the Legislature to provide necessary laws to carry out and enforce this article shall include the right to provide for manufacture, or sale by . . . cities. . . ."

It is necessary, however, to examine, also, certain provisions of sections 1 and 3 of said article, which are as follows:

"Section 1. The board of county commissioners of each county in the state, not oftener than once in every two years, upon the application of one-fourth of the registered voters of any county, shall call and provide for an election in the county in which application is made, to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited therein, the question to be determined by a majority of those voting at the election called under this section. . . ."

"Section 3. Until changed by elections called under this article, the status of all territory in the state of Florida as to whether the sale is permitted or prohibited shall be the same as

it was on December 31, 1918, provided that at the general election in 1934 or at any time within two years after this article becomes effective the board of county commissioners of any county shall, upon the application of five per cent of the registered voters of the county, call and provide for an election to decide whether the sale shall be prohibited in such county, said election to be otherwise as provided in article I hereof."

It seems clear from the foregoing that the county is made the unit for an election under said article and that where the result of the election is against the sale of intoxicating liquors, wines or beer, such sale is prohibited throughout the entire territory. (See *McGriff v. State*, 63 So. 724.)

I am of the opinion, therefore, that the Legislature does not possess the authority about which inquiry is made and the question must be answered in the negative.

### MISCELLANEOUS PROVISIONS

December 10, 1947.—047-418.

#### STATE REPRESENTATIVE—SCHOOL TRUSTEE— HOLDING TWO OFFICES

QUESTION: May the same person hold the office of county school trustee and state representative at the same time without violating the state constitution or statutes?

*To Honorable J. Troy Peacock, Representative, Jackson County, Marianna, Florida:*

Under the laws of this state I am unable to give an official opinion upon the foregoing question; however, for school trustees have been classified as "subordinate school officers" by the Florida Supreme Court (*State v. Blake*, 110 Fla. 178, 148 So. 566; and see also section 3, article XII, of the state constitution). Although section 7, article III, of the state constitution, provides that "no person holding a lucrative office or appointment under . . . this state, shall be eligible to a seat in the Legislature of this state" section 15, article XVI, of the same constitution, provides that "notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office." Trustees of school districts are clearly "county school officers" within the constitutional provision although they may not be county officers for all purposes.

Under section 6, article III, of the state constitution, the House of Representatives is the "judge of the qualifications, elections and returns of its own members" and the courts are without jurisdiction to determine the right of one elected to the Legislature to hold such office, such question being one which only the Legislature may determine (*Rigsby v. Junkin*, 146 Fla. 347, 1 So. 2d. 177).

Under the foregoing authorities, it seems clear that one may be elected to, and hold both, the office of county school trustee and of state representative; however, only the house itself has power to determine that question finally when it passes upon the qualifications, and election, and the returns thereof. When determined by the house its decision would seem to be final and not reviewable by the courts.

December 11, 1947.—047-417.

#### DEPUTY SHERIFF—SCHOOL TRUSTEE— HOLDING TWO POSITIONS

QUESTION: Is a deputy sheriff disqualified from holding the office of school district trustee?



*To Honorable Colin English, State Superintendent of Public Instruction:*

The question doubtless arises by reason of section 15, article XVI, of the Florida Constitution which reads in part as follows:

"... and no person shall hold, or perform the functions of, more than one office under the government of this State at the same time; provided, Notaries Public, militia officers, county school officers and Commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office."

While a tax school district trustee is an officer of a school district rather than of the county, it is my opinion that he comes within the meaning of "county school officers" in the quoted section of the constitution, and, therefore, may hold another office.

Furthermore, notwithstanding the fact that a deputy sheriff is required to subscribe to the same oath as the sheriff and to file a bond "conditioned upon the faithful performance of the duties of his office," the supreme court held in *State v. Gandy*, 179 So. 166, that a deputy sheriff is not an independent officer.

For these reasons the question requires a negative answer.

August 11, 1947.—047-266.

FLORIDA CHILDREN'S COMMISSION—ELIGIBILITY OF OFFICIALS

QUESTIONS: 1. Is a judge of a juvenile court eligible for appointment to membership on the Florida Children's Commission established by chapter 23810, Laws of Florida, 1947?

2. May all or any of the four state officials named in section 1 of chapter 23810, as members of the commission, lawfully hold such membership?

*To Honorable Millard F. Caldwell, Governor:*

Section 1 of chapter 23810, Laws of Florida, 1947, reads in part as follows:

"That there is hereby created the Florida Children's Commission, which shall consist of not less than fifteen (15) nor more than twenty-one (21) members all to be appointed by the governor of Florida. The membership of the commission shall include the state superintendent of public instruction, the state health officer, the state welfare commissioner and the chairman of the crippled children's commission. . . ."

The section also provides for the appointment of the non-official members of the commission to overlapping terms, etc.

The duties and functions of the commission are set up in section 2. They consist chiefly in research, surveys, study, and planning in the field of child welfare, and cover the entire field. The program of the commission is broad and important. Prominently included, is planning for coordination in the activities of the several state agencies concerned with child welfare, and cooperation of the latter, as well as the commission, with similar agencies established at all other governmental levels. The court has held that members of boards similar to this are state officers. The judge of a juvenile court is a public officer and would, therefore, be ineligible for appointment to the Florida Children's Commission under article XVI, section 15 of the Florida Constitution, which provides that no person shall hold or perform the functions of more than one office under the government of this state at the same time. Another reason why a juvenile judge would be ineligible for membership on the Florida Children's Commission is the fact that he is ex officio a member of the county committee

for the county in which he lives, which committee is established in section 3 of this same act. This opinion does not relate to membership on the county committee.

As to the second question—it will be observed that section 1 of the act provides that the commission shall consist of not less than fifteen nor more than twenty-one members, all to be appointed by the governor; but it also provides that the membership of the commission shall include the four named state officials. In Advisory Opinion to the Governor, 1 So. (2d) 636, which appears to provide the answer to the question, the court held that under article XVI, section 15, of the constitution, a state officer is ineligible for appointment to membership on such a board, but also held that if a state officer were named in the statute as a member of the board, such designation does not violate that constitutional provision because the effect is merely to impose additional duties on such state officials. It is not necessary to read the words "all to be appointed by the Governor" as including the named state officials. On the contrary, it may be assumed that the Legislature did not intend to do an unconstitutional thing by requiring their appointment but intended the appointment only of the non-official members. Applying the foregoing advisory opinion of the supreme court, it appears that while the four named state officials may not be appointed to membership by the governor, they, lawfully, hold membership by reason of the statute itself which imposes such additional duties upon those officials.

August 9, 1947.—047-247.

#### CONSTABLE AS CHIEF OF POLICE—LEGALITY

**QUESTION:** Is it legal for a person to serve as constable in Pasco county, and at the same time be chief of police of New Port Richey, Florida, drawing a salary as such chief of police?

*To Mr. Russell Thomas, New Port Richey, Florida:*

Attention is called to section 15 of article XVI of the Florida Constitution, which provides that "no person shall hold, or perform the functions of more than one office under the government of this state at the same time." Attention is further invited to the decision of supreme court in the case of Attorney General v. Connors, 27 Fla. 329, 9 So. 7, in which it was held that the sheriff of a county might hold the office of city marshal. In the body of the opinion the court, referring to the provisions of the constitution, said that the inhibition in the constitution is aimed solely and entirely against offices held under, or whose duties appertain to, the government of the state, and that after careful and exhaustive search the court was unable to find any authority that holds that the government of municipalities forms any part of the government of the state as such, considered in the broad sense of the term "State Government."

It appears that one may serve as constable and also hold the position of chief of police without violating the constitutional provision aforementioned.

July 17, 1947.—047-197.

#### CHURCH PROPERTY—EXEMPTION—USE

**QUESTION:** Where a church in this state owns property, which is used for administrative purposes, which is not located upon lands upon which a house of public worship is located and is not adjacent to nor a part of a church building, is such property entitled to exemption from taxation under the laws of this state?

*To Honorable C. M. Gay, State Comptroller:*

It appears, from the request for opinion and a letter from the tax assessor of the county wherein the property in question is located, that the property in question consists of an apartment, garage or storage space and a converted residence. Such buildings are not a part of, or adjacent to, any house of public worship, and no church services are conducted on the premises. Although four rooms in the property are rented for a reasonable rent, no revenue is produced for the use of the church. The property is used by a clerical staff performing clerical work relating to missions in Central and South America. I presume that the property is owned by the general conference of one of the present day church organizations; but I am without knowledge as to whether such general conference is a corporation or an association.

The state constitution contains two provisions relating to tax exemption for property used for municipal, educational, literary, scientific, religious and charitable purposes (section 1, article IX, and section 16, article XVI). Section 1, article IX, is not self-executing, but merely authorizes the Legislature to provide for such exemptions. Section 16, article XVI, is self-executing. The exemptions authorized by section 1, article IX, as provided by the Legislature pursuant thereto, are set out in subsections in subsection (4); section 192.06, Florida Statutes, 1941, as amended. The only statute relating to exemption of property used for religious purposes is subsection (4); section 192.06, Florida Statutes, 1941, as amended, which subsection provides tax exemption for "all houses of public worship and the lots on which they are situated, and . . . every parsonage . . ." but adds "any building being a house of worship which shall be rented or hired for any other purpose except for schools or places of Worship, shall be taxed the same as any other property." There is no other tax exemption statute relating to property used for religious purposes.

It is apparent that under section 1, article IX, of the state constitution, and the definitive statute (section 192.06, Florida Statutes, 1941, as amended), exemption of property for religious purposes obtains only to church buildings and the lots occupied by them; therefore, those provisions of the organic law and the statutes do not apply to the facts here for the simple reason there is no house of worship (*Lumms v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608). If the property in question is entitled to exemption from taxes it must be under section 16, article XVI, of the state constitution, which is applicable only to corporations and not to associations and other unincorporated bodies.

Under section 16, article XVI, of the state constitution, all corporate property is required to be taxed that is not "held and used exclusively for . . . religious . . . purposes." This section of the constitution was applied to certain property in Miami used for religious purposes which had no church building thereon. (See *Lumms v. Miami Beach Congregational Church*, *supra*.) Whether real estate, having no church building thereon, is used and held exclusively for religious purposes, is a question of fact to be determined by the tax assessor in the first instance.

The question must be answered in the negative, unless the owner of the property in question is a corporation and the property is held and used exclusively for religious purposes so as to be within the rule of *Lumms v. Miami Beach Congregational Church* cited, *supra*.

May 23, 1947.—047-140.

#### RESIDENCE—NOTARY PUBLIC—APPOINTMENT

QUESTION: May a person who has just arrived in this state after having legal residence in another state acquire citizenship promptly and without delay so as to be appointed a notary public?

*To Honorable R. A. Gray, Secretary of State:*

Reference is made to opinions of this office dated December 10, 1942 and December 21, 1943 (numbers 042-555 and 043-337). In the former of these it was held that a one-year, or any other specific period of residence in the State of Florida, was not a prerequisite to one's eligibility for appointment to the office of notary public. In the latter of these opinions, it was held that an alien was not eligible to hold the office of notary public in this state; and to like effect is an opinion of this office (No. 047-80), dated March 20, 1947. In said opinion No. 043-337, it is stated that "in order for a person to be appointed a notary public in the state of Florida he must be a citizen of the state of Florida."

The question is answered as follows:

A person, who, prior to location in this state, was a citizen of another state, and who has moved to this state for the purpose of establishing a domicile here and has established a domicile here, is a citizen of Florida, and as such is eligible for appointment to the office of notary public. When a person moves to this state with the present intent of making this state his home and domicile, upon location here that person is a citizen of Florida; and such a person is eligible, from the standpoint of citizenship, to be appointed notary public. The question of the establishment of domicile must be determined from the facts of each case.

March 20, 1947.—047-80.

#### NOTARY PUBLIC—ALIEN—ELIGIBILITY

**QUESTION:** Is a citizen of Canada presently residing in Florida eligible for appointment to the office of Notary Public?

A notary public is an officer of the State of Florida, article XVI, section 15, Florida Constitution. In my opinion, under the constitution and laws, a citizen of a foreign country is not eligible for appointment to such office. Hence, the question is answered in the negative.

April 29, 1947.—047-115.

#### COUNTY COMMISSIONERS—AS PILOT COMMISSIONERS

**QUESTION:** May a person serve at the same time as a member of a board of county commissioners and as a member of a board of pilot commissioners, under chapter 310, Florida Statutes, 1941?

*To Honorable R. A. Gray, Secretary of State:*

Chapter 310, Florida Statutes, 1941, provides for a board of pilot commissioners in each county in which a port is located, and for certain powers and duties of such board. Since it appears that a member of such board is a public officer, the provisions of article XVI, section 15, Florida Constitution, would seem to prohibit a person's serving as a member of such board and as a member of a board of county commissioners at the same time.



## CHAPTER XLI

### MISCELLANEOUS OPINIONS

August 16, 1948.—048-273.

#### STATE LIABILITY—UNOFFICIAL ACTS OF FORMER EMPLOYEE

**QUESTION:** Is the State of Florida authorized to disperse any funds to a former employee of the State of Florida, because of having involved himself, without having such authority, with a Mrs. X? This involvement with this party was of a private nature and without knowledge of the state service officer, or the Florida Department of Veterans' Affairs?

*To Honorable David L. Wiley, State Service Officer, Pass-A-Grille, Florida:*

I know of no law which would authorize the state to disburse any such funds under the circumstances mentioned and I, therefore, answer the question in the negative.

July 2, 1947.—047-181.

#### TEACHER PENSION—FUND FOR PAYMENT

**QUESTION:** When a statute authorizes and directs that the State Board of Pensions place the name of a former school teacher upon the pension rolls of the state and pay such person the sum of fifty dollars per month for the remainder of his life, but fails to designate the fund from which such pension shall be paid, from what fund should it be paid?

*To Honorable C. M. Gay, State Comptroller:*

Although it has been the practice of the Legislature to place the payment of school pensions under the supervision of the State Board of Education (see chapters 22692, 20732, 20713, and 20697, Laws of Florida, acts of 1945 and 1941), the payment of school pensions under the supervision of the State Board of Pensions is not unheard of (see chapters 21667 and 22077, Laws of Florida, acts of 1943).

Although the State Board of Pensions exists under chapter 291, Florida Statutes, 1941, which relates to confederate pensions, I find no legal reason why the Legislature may not place the payment of other pensions under the supervision of that board.

No particular form of wording is necessary to constitute a valid appropriation. However, the legislative intent to appropriate funds must be clear and certain; it cannot be inferred by construction of doubtful words or ambiguous language (42 Am. Jur. 749, section 45; 59 C. J. 245, Section 388). From an examination of numerous laws I find that the Legislature, in many cases in making an appropriation, makes no reference to the fund from which such appropriation is to be paid. Most legislative pensions to school teachers appear to have been payable from the general revenue fund of the state. The naming of the fund has been held not to be an essential part of an act (59 C. J. 245, note 43). The act in question appears to be sufficient as an appropriation within the foregoing rules. It was stated in *Proll v. Dunn*, 80 Cal. 220, 22 P. 143, that payments authorized by law to be made from the state treasury are payable out of the general fund if not otherwise provided, which holding was cited with approval in *Miller v. Childers*, 107 Okla. 57, 238 Pac. 204, text 208.

I am, therefore, of the opinion that the pension in question should be paid as provided in the act from the general revenue fund of the state.

November 23, 1948.—048-341.

DEPOSITS—BANK SECURITIES—REVENUE CERTIFICATES

QUESTION: Do the proposed University of Florida dormitory revenue certificates, series 1948, qualify as securities for state deposits in banks?

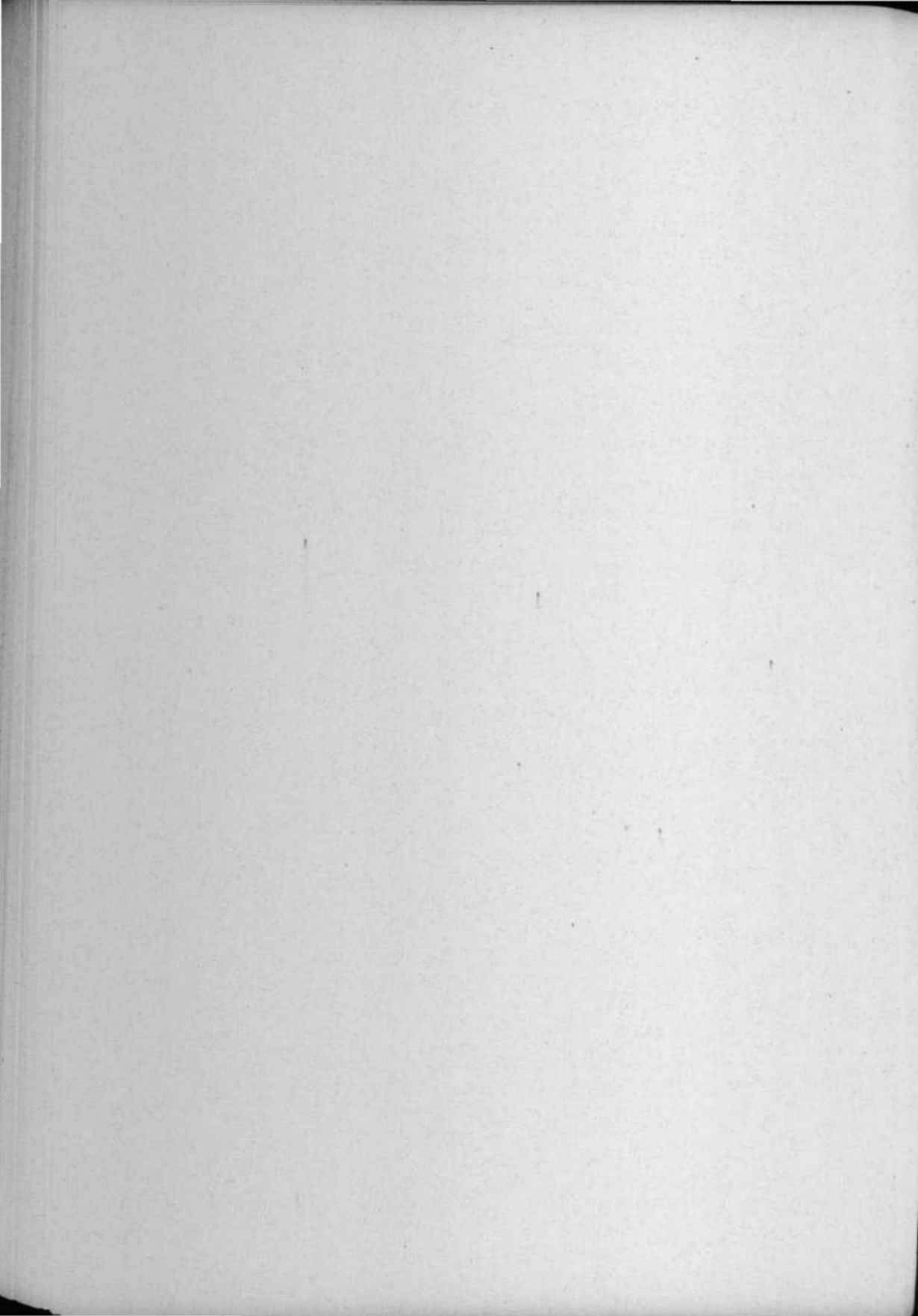
*To Honorable J. Thomas Gurney, Chairman, Board of Control,  
Orlando, Florida:*

In an opinion rendered January 7, 1944, No. 044-17, I held that state funds are to be deposited in banks under the provisions of sections 18.10 and 18.11, Florida Statutes, 1941, and that the securities named therein were exclusive.

Section 18.11 provides that the securities to be given by banks for state deposits "shall consist of bonds of the United States, and the bonds of the several states, county and municipal bonds, and county or county school time warrants, issued by any one of the counties, or cities, of the State of Florida . . ." These obligations are secured by the full faith and credit of the issuing authority; revenue certificates are not so secured.

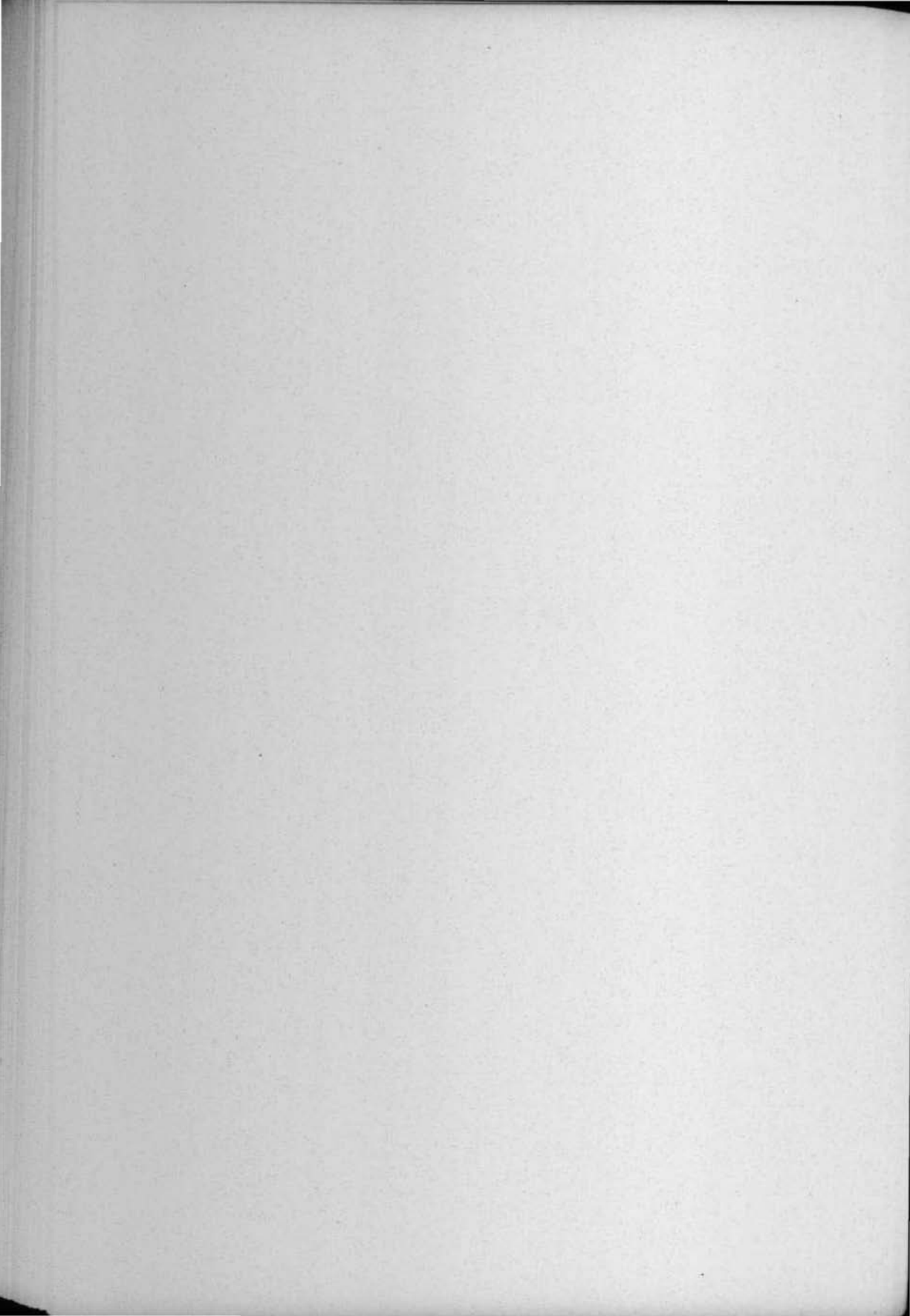
It is my opinion that revenue certificates do not come within the types of securities named in section 18.11, and, therefore, are not acceptable as securities for state deposits.

This opinion is restricted to securities for state funds deposited in banks.



## **PART II**





## THE OFFICE OF ATTORNEY GENERAL IN FLORIDA

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law of Florida.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

### COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with a considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceedings when in his opinion a condition exists which requires the exercise of the power. It is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al vs. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

### CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be the Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the Supreme Court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

### STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).\*

\* Reference is to Florida Statutes, 1941.

2. Recommend, at the convening of every session of the legislature, a person experienced in indexing to supervise and assist the indexing clerks of each house in making the index for both journals and to prepare the journals in bound form (§16.04).

3. Prepare marginal abstracts to the several sections of the statutory law and a general alphabetical index to the general acts of each session of the legislature (§16.44).

4. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01).

5. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01 and §22, Art. IV, Fla. Const.).

6. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the State of Florida (§16.01).

7. Exercise general superintendence and direction over the several state attorneys (§16.08).

8. Report the decisions of the supreme court, have them prepared in printed volumes and keep one copy of each in his office (§§25.29, 25.30).

9. Prepare and cause to be printed copies of fee bills of the various officers of the several counties of the state and to send copies of same to such county officials (§58.07).

10. Approve the bond of the comptroller (§17.01).

11. Prosecute combinations against Florida meats (§544.02).

12. Investigate and rectify commercial discriminations (§§540.02-540.05).

13. Enjoin violations of the laws regulating commercial foodstuffs (§580.19).

14. Conduct condemnation proceedings on behalf of the Board of Commissioners of State Institutions and on behalf of the adjutant general's office for military purposes (§§73.22, 250.48).

15. Approve articles of incorporation for co-operative marketing associations (§618.04).

16. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

17. Enforce the antitrust laws of the state (§542.03).

18. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

19. Approve title to real estate in which the state is interested (§135.16).

20. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

21. Represent the state in disbarment proceedings in the supreme court (§39.28).

22. Pass upon and approve regulations of district drainage boards (§298.53).

23. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).
24. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).
25. Conduct quo warranto proceedings (§§80.03, 875.19).
26. Act as attorney for the Railroad and Public Utility Commission (this work is negligible because of the fact that the Railroad and Public Utility Commission has authority to employ its own special counsel.) (§§350.29, 350.30, 350.62, 350.66).
27. Attend to all legal business arising in connection with the laws governing the salt-water fishing industry. (§373.22).
28. Prepare contracts for purchase of uniform school books (§233.16).
29. Devise and furnish a form of seal for all the courts of the state (§26.48).
30. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).
31. Give special attention to legal proceedings in connection with the sponge fishing industry (§373.22).
32. Conduct suits on bonds of state health officer (§381.10).
33. Act as legal advisor and attorney for the State Plant Board (§581.02).
34. Act as legal advisor for the State Road Department. Said department, however, has a special attorney authorized by statute (§341.17).
35. Sue to recover fines for doing business without a license (§625.17).
36. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).
37. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§655.10).
38. Enforce the Vital Statistics Law (§382.37).
39. Act as attorney for the State Racing Commission. Said commission, however, has statutory authority to employ its special counsel (§550.01).
40. Act as attorney for the Parole Commission (§947.11).
41. Act as ex officio member and legal advisor of the State Defense Council (§249.03).
42. Conduct extradition hearings for the governor (§941.04).
43. Participate with other states in preserving the constitutional integrity of the state (§16.52).
44. Represent the state treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§69.07).
45. Devise a suitable seal for the supervisors of registration (§98.51).
46. Represent the insurance commissioner in connection with insurance matters (§§637.54, 640.13).
47. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§481.10).



48. Represent the state in proceedings under the Declaratory Judgments Law where the constitutionality of statutes is involved (§87.10).

49. Assist in the enforcement of the Basic Science Law (§456.22).

50. Assist in the collection and enforcement of chain store license taxes (§204.13).

51. Call a biennial session of circuit judges to consider their report on desirable or necessary legislation (§16.06).

52. Bring proceedings to test the validity of the incorporation of co-operative marketing associations and nonprofit co-operation associations (§§618.23, 619.09).

53. Bring proceedings to recover escheated property (§731.33).

54. Bring proceedings to forfeit prize money in lotteries (§849.12).

55. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).

56. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).

57. Assist in the enforcement of laws regulating the practice of optometry (§463.19).

58. Approve the form for bonds of nonresident outdoor advertisers (§479.06).

59. Represent the commissioner of agriculture in connection with the enforcement of the Pure Seed Labeling Law (§578.15).

60. Assist in the enforcement of the laws regulating small loan businesses (§516.23).

61. Direct and be in charge of the Statutory Revision Department (§§16.43-16.51).

62. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy Act lands (§196.21).

#### MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. Board of Commissioners of State Institutions (Fla. Const. §17, Art. IV).

2. State Board of Education (Fla. Const. §3, Art. XII).

3. Trustees of Internal Improvement Fund (§253.02, Florida Statutes, 1941).

4. State Board of Drainage Commissioners (§298.69, Florida Statutes, 1941).

5. State Budget Commission (§216.01, Florida Statutes, 1941).

6. State Board of Conservation (§§373.01, 377.07, Florida Statutes, 1941 and 1945 Cumulative Supplement to Vol. I).

7. State Board of Pardons (Fla. Const. §12, Art. IV).

8. State Canvassing Board (§99.49, Florida Statutes, 1941).

9. Florida Securities Commission (§517.03, Florida Statutes, 1941).

10. Railroad, etc., Assessment Board (§195.01, Florida Statutes, 1941).
11. Board for fixing values of investment securities of trust companies (§655.10, Florida Statutes, 1941).
12. Board for supervision and regulation of forms to be used for assumption of risks by surety companies (§648.16, Florida Statutes, 1941).
13. State Housing Board (§424.04, Florida Statutes, 1941).
14. Department of Public Safety Executive Board (§321.01, Florida Statutes, 1941).
15. State Board for Vocational Education (§229.08, Florida Statutes, 1941).
16. Board of Trustees of the Teachers' Retirement System (§238.03, Florida Statutes, 1941).
17. State Textbook Purchasing Board (§233.13, Florida Statutes, 1941).
18. Ex officio member of Florida State Defense Council (§249.03, Florida Statutes, 1941).
19. Governor's Cabinet (Fla. Const. §20, Art. IV).

## STATUTORY REVISION DEPARTMENT

The 1943 Legislature created a permanent statutory revision, legislative drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., 1947 Cumulative Supplement to Florida Statutes, 1941). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

**Continuing plan of operation**—The statutory revision department operates, as directed under the statutes (see §§16.11-16.51, Florida Statutes, 1941, and its 1947 Cumulative Supplement), to the fullest extent and according to the intent and purpose of the aforementioned statutes and of the Legislature, its work being carried forward in a continuous manner and in the following objective classifications:

(1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies, eliminating redundancies and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by revisers' bills to be submitted to each session of the Legislature.

(2) Carrying on the cumulative supplemental compilation of the statutes subject to the department codification according to the system and manner of numbering and classifying as now established, and in doing so, convert the session laws as passed by each session of the Legislature into their appropriate place in Florida Statutes, 1941—Volume I, in conformance to said system.

(3) Preparing marginal abstracts and an index of the general acts and resolutions, and an index to the local acts of the Legislature, after the adjournment of each session.

(4) Indexing each of the journals of the two branches of the Legislature.

(5) Preparing and having printed from time to time such number of copies as may be required of supplements to Volumes I, II and III of Florida Statutes, 1941, and secure copyrights on same.

(6) Maintaining a system for compiling and preserving material, for use at such time as the Legislature may direct another complete revision and compilation of the general statutes and laws.

(7) Maintaining a bill drafting department and legislative reference library in conformance with legislative authorization.

(8) Carrying on a continuous system of compiling supplemental material to Volumes I, II and III. This work, with respect to Volume II, is kept up to date from day to day, and information therefrom is furnished to the members of the bench and bar upon request.

(9) Carrying on a continuous reworking of the general index to Volume I and its current Cumulative Supplement. Keeping such index material compiled in such form as to facilitate the printing of a revised index at any time.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general, as may be required by law, or that in the opinion of the attorney general, where authorized, is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

**Preservation of type used.**—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

**Selection and supervision of personnel.**—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision is under the attorney general, and for administrative purposes, under the general office administrative assistant, and for revision, annotation and other departmental technical work and objectives, under the chief reviser.

(2) Principal study of the statutes, revisions and preparation of revisers' bills is under a qualified chief reviser and with an assistant; such chief reviser and assistant have supervisory charge over the personnel of the revision department and directing authority and charge over the technical work of the department.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the chief reviser.

(4) Annotating and related work is kept up to date under the supervision of the chief reviser.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the Legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the chief adviser.

**The revisers' bills**, as provided by statute, are prepared by the reviser and the department under his direction. The principal objectives of revisers' bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning only one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation or jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning only one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes as carried forward in the Cumulative Supplements.

In the compilation of material and the drafting of revisers' bills, the following rules and procedure are adhered to:

(1) A continuing and systematic study of the statutes is carried on.

(2) A careful search is made for:

(a) Inappropriateness of run-in lines to sections.

(b) Misspelled words and poor punctuation.

(c) Statutes limited as to time of operation and which have expired.

(d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.

(e) Laws that have become obsolete.

(f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.

(g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.

(h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.



(i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.

(j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.

(k) Conflicting powers and duties of officials.

(l) Repetitious statutes.

The department carries continuing notes extracted from the annotations as to the construction, operation, validity or constitutionality of the laws; maintains a running file containing a list of errors, suggestions, etc., that are submitted by other persons; and maintains a system of keeping comprehensive notes and data for the final preparation of the revisers' bills. In the preparation of revisers' bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verboseness and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

**Printing.**—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided, particularly as to supplemental publications.

# COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE (From Jan. 1, 1947 Through Dec. 31, 1948)

## CIVIL CASES

Number of cases pending January 1, 1947.....	338	
Number of cases docketed between January 1, 1947, and December 31, 1948, inclusive,		
Docketed and still pending.....	94	
Docketed and closed.....	107	201
		<u>539</u>
Number of cases disposed of between January 1, 1947, and December 31, 1948, inclusive,		
Pending January 1, 1947, closed.....	92	
Docketed and closed.....	107	199
		<u>340</u>
Number of cases pending January 1, 1949.....		

## CRIMINAL CASES

Number of cases pending January 1, 1947.....	61	
Number of cases docketed between January 1, 1947, and December 31, 1948, inclusive,		
Docketed and still pending.....	89	
Docketed and closed.....	107	196
		<u>257</u>
Number of cases disposed of between January 1, 1947, and December 31, 1948, inclusive,		
Pending January 1, 1947, closed.....	56	
Docketed and closed.....	107	163
		<u>94</u>
Number of cases pending January 1, 1949.....		

## TOTAL CASES

Total civil and criminal cases pending or docketed during biennium ending December 31, 1948.....	796	
Total civil and criminal cases pending or disposed of during biennium ending December 31, 1948.....	362	
		<u>434</u>
Total civil and criminal cases pending January 1, 1949.....		

## EXTRADITION STATISTICS REQUISITIONS BY FLORIDA

During the years 1947 and 1948 the State of Florida made requisitions on other States, the District of Columbia, Alaska and Mexico for fugitives from justice, as follows:

Alabama .....	15	Nevada .....	1
Arizona .....	2	New Jersey.....	11
Arkansas .....	2	New York.....	26
California .....	9	North Carolina.....	6
Colorado .....	2	Ohio .....	9
Connecticut .....	4	Oklahoma .....	1
Georgia .....	38	Pennsylvania .....	9
Illinois .....	13	South Carolina.....	2
Indiana .....	4	Tennessee .....	5
Kansas .....	3	Texas .....	9
Kentucky .....	2	Utah .....	1
Louisiana .....	4	Virginia .....	6
Maine .....	1	Washington .....	1
Maryland .....	4	West Virginia.....	3
Massachusetts .....	3	Wisconsin .....	1
Michigan .....	7	District of Columbia.....	2
Mississippi .....	1	Alaska .....	1
Missouri .....	3	Mexico .....	1

## EXTRADITION STATISTICS REQUISITIONS ON FLORIDA

During the years 1947 and 1948 the following States have made requisitions on the State of Florida for fugitives from justice, as follows:

Alabama .....	35	Mississippi .....	2
Arkansas .....	2	Missouri .....	2
California .....	18	Nebraska .....	1
Colorado .....	2	New Jersey.....	5
Connecticut .....	5	New York.....	25
Georgia .....	46	North Carolina.....	21
Illinois .....	14	Ohio .....	10
Indiana .....	2	Oklahoma .....	1
Iowa .....	1	Pennsylvania .....	7
Kansas .....	2	South Carolina.....	6
Kentucky .....	1	Tennessee .....	5
Louisiana .....	3	Texas .....	6
Maryland .....	3	Virginia .....	13
Massachusetts .....	5	West Virginia.....	3
Michigan .....	10	Wisconsin .....	3
Minnesota .....	1		

## APPROPRIATIONS AND EXPENDITURES ATTORNEY GENERAL

### APPROPRIATIONS

Salary Fund Balance January 1, 1947.....	\$ 68,335.96
Expense Fund Balance January 1, 1947.....	7,559.66
Salary Fund Appropriation July 1, 1947 to June 30, 1949.....	290,520.00
Expense Fund Appropriation July 1, 1947 to June 30, 1949.....	21,480.00
Contingent Appropriation July 1, 1947 to June 30, 1949.....	12,360.00
 Total .....	 \$400,255.62

### EXPENDITURES

Salary Fund January 1, 1947 to June 30, 1947.....	\$ 67,085.16
Salary Fund for Expense January 1, 1947 to June 30, 1947.....	1,250.00
Expense Fund January 1, 1947 to June 30, 1947.....	7,559.56
Amount Reverted, Salary and Expense July 1, 1947.....	.90
Salary Fund for Salaries July 1, 1947 to December 31, 1948.....	194,746.68
Salary Fund for Expense July 1, 1947 to June 30, 1948.....	7,218.26
Expense Fund for Expense July 1, 1947 to December 31, 1948....	16,110.00
Contingent Fund for Expense July 1, 1948 to December 31, 1948	3,630.00
 Total .....	 \$297,600.56
Balance January 1, 1949.....	\$102,655.06

## COLLECTIONS BY ATTORNEY GENERAL

The following collections:

Proceeds from condemnation suits.....	\$ 1,981.52
Proceeds from tax foreclosure suits.....	26,096.01
Recovered on delinquent maintenance accounts.....	1,101.62
Escheatments .....	38,533.23
 Total .....	 \$ 67,712.38



## ATTORNEYS GENERAL OF FLORIDA

### Since 1845

JOSEPH BRANCH .....	1845-1846
AUGUSTUS E. MAXWELL .....	1848-1848
JAMES T. ARCHER .....	1848-1848
DAVID P. HOGUE .....	1848-1853
MARIANO D. PAPY .....	1853-1860
JOHN B. GALBRAITH .....	1860-1868
JAMES D. WESCOTT, JR. ....	1868-1868
A. R. MEEK .....	1868-1870
SHERMAN CONANT .....	1870-1870
J. P. C. DREW .....	1870-1872
H. BISSBEE, JR. ....	1872-1872
J. P. C. EMMONS .....	1872-1873
WILLIAM A. COCKE .....	1873-1877
GEORGE P. RANEY .....	1877-1885
C. M. COOPER .....	1885-1889
WILLIAM B. LAMAR .....	1889-1903
JAMES B. WHITFIELD .....	1903-1904
W. H. ELLIS .....	1904-1909
PARK TRAMMELL .....	1909-1913
THOMAS F. WEST .....	1913-1917
VAN C. SWEARINGEN .....	1917-1921
RIVERS BUFORD .....	1921-1925
J. B. JOHNSON .....	1925-1927
FRED H. DAVIS .....	1927-1931
CARY D. LANDIS .....	1931-1938
GEORGE COUPER GIBBS .....	1938-1941
J. TOM WATSON .....	1941-1949

## BOARDS, COMMISSIONS AND BUREAUS OF THE STATE OF FLORIDA

ACCOUNTANCY, STATE BOARD OF (See State Board of Accountancy)

ADMINISTRATION, STATE BOARD OF (See State Board of Administration)

AGRICULTURAL AND INDUSTRIAL RELIEF COMMISSION (See Florida State Improvement Commission)

AGRICULTURAL MARKETING BOARD, STATE (See State Agricultural Marketing Board)

ARCHEOLOGIST, STATE (See State Archeologist)

### ARMORY BOARD

Composed of the governor, adjutant general, state quartermaster, general officers of the line and the officers who have attained the rank of colonel in the active national guard of this state (§250.48, Florida Statutes, 1941).

The powers and duties of the armory board are set out in §§250.48 and 250.49, Florida Statutes, 1941.

### ATLANTIC STATES MARINE FISHERIES COMMISSION

Consists of three members, appointed by the Governor, Supervisor of Conservation, legislator who is a member of the House of Representatives Committee on Commerce, their terms will terminate at the time each ceases to hold his office, a citizen who has knowledge and interest in marine fisheries problems. Whose term shall be three years and he shall hold office until his successor is appointed and qualified (§374.44, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 374, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941.

### BARBERS' SANITARY COMMISSION

Consists of three members appointed by the governor for terms of four years (§476.17, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 476, Florida Statutes, 1941.

BEAUTY CULTURE, STATE BOARD OF (See State Board of Beauty Culture)

BEVERAGE DEPARTMENT, STATE (See State Beverage Department)

BLIND, FLORIDA COUNCIL FOR THE (See Florida Council for the Blind)

BOARD, ARMORY (See Armory Board)

### BOARD FOR FIXING VALUES OF INVESTMENT SECURITIES OF TRUST COMPANIES

Composed of the comptroller, state treasurer and attorney general (§655.10, Florida Statutes, 1941).

The general powers and duties of the board are set out in §655.10, Florida Statutes, 1941.

### BOARD FOR LICENSING LABOR BUSINESS AGENTS

Composed of governor, secretary of state and superintendent of public instruction (§481.04, 1947 Supplement, Florida Statutes, 1941).

The general powers and duties of the said board are set out in the said section of the statutes.

**BOARD FOR SUPERVISION AND REGULATION OF FORMS FOR ASSUMPTION OF RISKS BY SURETY COMPANIES**

Composed of the governor, comptroller, state treasurer and attorney general (§648.16, Florida Statutes, 1941).

The general powers and duties of the board are set out in §648.16, Florida Statutes, 1941.

**BOARD OF ADMINISTRATION, STATE (See State Board of Administration)****BOARD OF ARCHITECTS, FLORIDA STATE (See Florida State Board of Architects)****BOARD OF CHIROPODY EXAMINERS**

Consists of three chiropodists practicing in this state and the secretary of the state board of medical examiners, who shall act as ex officio executive officer of the board. Members of the board are appointed by the governor for terms of three years (§461.05, Florida Statutes, 1941). The general powers and duties of the board are set out in chapter 461, Florida Statutes, 1941.

**BOARD OF CHIROPRACTIC EXAMINERS, FLORIDA STATE (See Florida State Board of Chiropractic Examiners)****BOARD OF COMMISSIONERS OF STATE INSTITUTIONS**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§17, article IV, Florida Constitution).

The general powers and duties of the commissioners are set out in §17, article IV, Florida Constitution, §225.02 and chapters 135, 283, 393, 394, 409, 954, 955 and 956, Florida Statutes, 1941.

**BOARD OF COMMISSIONERS OF THE POLICE OFFICERS' INSURANCE AND ANNUITY FUND**

Consists of five members appointed by the governor for terms of two years (§182.03, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 182, Florida Statutes, 1941.

**BOARD OF CONTROL**

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida, one from Middle South Florida, who have been residents of Florida for ten years, appointed by the governor for four years (§240.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 240, Florida Statutes, 1941.

**BOARD OF DRAINAGE COMMISSIONERS**

Composed of the governor, comptroller, state treasurer, attorney general and commissioner of agriculture (§298.69, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§298.69-298.73, Florida Statutes, 1941.

**BOARD OF EDUCATION, STATE (See State Board of Education)****BOARD OF ENGINEER EXAMINERS**

Consists of five members, appointed by the governor, for terms of four years (§471.08, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 471 and 472, Florida Statutes, 1941.

**BOARD OF EXAMINERS IN THE BASIC SCIENCES**

Consists of five members, appointed by the governor, for terms of four years (§456.07, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 456, Florida Statutes, 1941.

**BOARD OF FINANCE**

Consists of the governor, state treasurer and comptroller (§18.10, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§18.10-18.16, Florida Statutes, 1941.

**BOARD OF HEALTH, STATE (See State Board of Health)****BOARD OF MEDICAL EXAMINERS**

Composed of ten practicing physicians, residents of this state, appointed by the governor for terms of four years (§§458.01 and 458.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 458, Florida Statutes, 1941, and 1947 Supplement, Florida Statutes, 1941.

**BOARD OF OPTOMETRY, FLORIDA STATE (See Florida State Board of Optometry)****BOARD OF PARDONS**

Composed of the governor, secretary of state, attorney general, comptroller and commissioner of agriculture (§12, article IV, Florida Constitution).

The general powers and duties of the board are set out in §12, article IV, Florida Constitution.

**BOARD OF PENSIONS, STATE (See State Board of Pensions)****BOARD OF PHARMACY FOR THE STATE OF FLORIDA**

Consists of five persons, pharmacists of the state, appointed by the governor for terms of four years (§465.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 465, Florida Statutes, 1941.

**BOARD OF PHOTOGRAPHIC EXAMINERS**

(Chapter 478, Florida Statutes, 1941, providing for board, held invalid and unconstitutional in *Sullivan v. De Cerb*, 156 Fla. 496, 23 So. 2d. 571.) Repealed by chapter 23699, Laws of Florida, 1947.

**BOARD OF REVIEW, NATIONAL (See National Board of Review)****BOARD OF TRUSTEES OF TEACHERS' RETIREMENT SYSTEM**

Composed of the state board of education and two teachers appointed by the governor for terms of three years each (§238.03, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 238, Florida Statutes, 1941.

**BOARD OF VETERINARY EXAMINERS**

Consists of three licensed graduate veterinarians, appointed by the governor for terms of four years (§474.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 474, Florida Statutes, 1941.

**BOARD, STATE HOUSING (See State Housing Board)****BOARD TO NAME TEACHERS FOR SUMMER SCHOOLS**

Composed of the presidents of the University of Florida and the Florida State University, and of the superintendent of public instruction (§239.14, Florida Statutes, 1941).

The powers and duties of the board are set out in §239.14, Florida Statutes, 1941.



**BOARD TO SUPERVISE FORMS FOR ASSESSMENT OF RISKS BY SURETY COMPANY**

Composed of the governor, state comptroller, state treasurer and attorney general (§648.16, Florida Statutes, 1941).

The general powers and duties of the board are set out in the above mentioned section of the statutes.

**BUDGET COMMISSION, STATE** (See State Budget Commission)

**BUREAU, MARKETING** (See Marketing Bureau)

**BUREAU OF IMMIGRATION**

The bureau of immigration is under the direction and supervision of the commissioner of agriculture (§26, article IV, Florida Constitution and §19.25, Florida Statutes, 1941).

The powers and duties of the bureau of immigration are set out in §26, article IV, Florida Constitution and §§19.25-19.28, Florida Statutes, 1941.

**BUREAU OF INSPECTION**

The bureau of inspection is under the direction and supervision of the commissioner of agriculture (§19.47, Florida Statutes, 1941).

The powers and duties of the bureau of inspection are set out in §§19.47-19.53, Florida Statutes, 1941.

**BUREAU OF VITAL STATISTICS**

This bureau is under the direction of the state board of health, which is composed of three members appointed by the governor for terms of four years (§§381.01 and 382.02, Florida Statutes, 1941).

The general powers and duties of the bureau are set out in chapter 382, Florida Statutes, 1941, and 1947 Supplement, Florida Statutes, 1941.

**CABINET, GOVERNOR'S** (See Governor's Cabinet)

**CHIROPODY EXAMINERS, BOARD OF** (See Board of Chiropractic Examiners)

**CITRUS COMMISSION, FLORIDA** (See Florida Citrus Commission)

**COMMISSION, BARBERS' SANITARY** (See Barbers' Sanitary Commission)

**COMMISSION, CONSTITUTIONAL MONUMENT PARK** (See Constitutional Monument Park Commission)

**COMMISSION, DIRECT TAX** (See Direct Tax Commission)

**COMMISSION, EVERGLADES NATIONAL PARK** (See Everglades National Park Commission)

**COMMISSION, FLORIDA CENTENNIAL** (See Florida Centennial Commission)

**COMMISSION, FLORIDA STATE IMPROVEMENT** (See Florida State Improvement Commission)

**COMMISSION, GAME AND FRESH WATER FISH** (See Game and Fresh Water Fish Commission)

**COMMISSION, HOTEL** (See Hotel Commission)

**COMMISSION, MILK** (See Milk Commission)

**COMMISSION, PAROLE** (See Parole Commission)

**COMMISSION, SECURITIES** (See Securities Commission)

**COMMISSION, STATE RAILROAD** (See State Railroad Commission)

COMMISSIONER, INSURANCE (See Insurance Commissioner)

COMMISSIONER OF REVENUE (Inheritance taxes)

The comptroller of the State of Florida is designated as commissioner of revenue (§198.05, Florida Statutes, 1941).

The general powers and duties of the commissioner are set out in chapter 198, Florida Statutes, 1941.

COMMISSIONERS OF STATE INSTITUTIONS, BOARD OF (See Board of Commissioners of State Institutions)

COMMISSIONERS ON UNIFORM STATE LAWS

Composed of three commissioners to be appointed by the governor for terms of four years (§11.01, Florida Statutes, 1941).

The powers, duties and qualifications of the commissioners are set out in §11.01, Florida Statutes, 1941.

COMMITTEE, TEXTBOOK RATING (See Textbook Rating Committee)

COMMITTEE FOR DEPOSITING STATE FUNDS (See Board of Finance)

COMMITTEE ON COURSES OF STUDY

Composed of nine members appointed by the state board of education upon the recommendation of the superintendent of public instruction for terms of four years (§233.01, Florida Statutes, 1941).

The powers, duties and qualifications of the committee are set out in chapter 233, Florida Statutes, 1941.

CONSERVATION, STATE BOARD OF (See State Board of Conservation)

CONSERVATION BOARD, STATE SOIL (See State Soil Conservation Board)

CONSTITUTIONAL MONUMENT PARK COMMISSION

Composed of the governor, secretary of state and one other person to be appointed by the governor, the term of office of appointee not being fixed (§265.08, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§265.08, 265.09, 265.14 and 265.15, Florida Statutes, 1941.

CONTROL, BOARD OF (See Board of Control)

COUNCIL FOR THE BLIND, FLORIDA (See Florida Council for the Blind)

COURSES OF STUDY, COMMITTEE ON (See Committee on Courses of Study)

CRIPPLED CHILDREN'S COMMISSION, FLORIDA (See Florida Crippled Children's Commission)

DADE MEMORIAL COMMISSION

Composed of three members, appointed by the governor, for terms of four years (§258.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§258.02-258.07, Florida Statutes, 1941.

DEFENSE COUNCIL, FLORIDA STATE (See Florida State Defense Council)

DENTAL EXAMINERS, FLORIDA STATE BOARD OF (See Florida State Board of Dental Examiners)

DEPARTMENT, STATE AUDITING (See State Auditing Department)

DEPARTMENT, STATE BEVERAGE (See State Beverage Department)

DEPARTMENT, STATE ROAD (See State Road Department)

DEPARTMENT, STATUTORY REVISION (See Statutory Revision Department)

DEPARTMENT OF PUBLIC SAFETY

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§321.01, Florida Statutes, 1941).

The general powers and duties of the department are set out in chapters 321 and 322, Florida Statutes, 1941.

DEPARTMENT OF VETERANS' AFFAIRS

Composed of seven members, one from each congressional district and one from the state at large, appointed by the governor for terms of four years each except the first board whose terms are as provided by law (§§292.04 and 292.04-1, Florida Statutes, 1941).

The general powers and duties of the department are set out in §§292.04 to 292.16, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941.

DEPOSITING STATE FUNDS, COMMITTEE FOR (See Committee for Depositing State Funds)

DIRECT TAX COMMISSION

Composed of the governor, state treasurer and comptroller (§14.12, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §14.12, Florida Statutes, 1941.

DRAINAGE COMMISSIONERS, BOARD OF (See Board of Drainage Commissioners)

ECONOMIC ADVANCEMENT COUNCIL, FLORIDA (See Florida Economic Advancement Council)

EDUCATION, STATE BOARD OF (See State Board of Education)

ELECTION CANVASSERS, STATE BOARD OF (See State Board of Election Canvassers)

ENGINEER EXAMINERS, BOARD OF (See Board of Engineer Examiners)

EVERGLADES NATIONAL PARK COMMISSION

Composed of not less than twelve and not more than thirty members to be appointed by the governor for a period of four years (§264.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 264, Florida Statutes, 1941, and §264.12, 1947 Supplement, Florida Statutes, 1941.

EXAMINERS FOR NURSES, STATE BOARD OF (See State Board of Examiners for Nurses)

EXAMINERS IN THE BASIC SCIENCES, BOARD OF (See Board of Examiners in the Basic Sciences)

FIRE MARSHAL, STATE (See State Fire Marshal)

FLORIDA AGRICULTURAL AND INDUSTRIAL RELIEF COMMISSION  
(Name changed to Florida State Improvement Commission.)

FLORIDA BOARD OF FORESTRY

Consists of five members, appointed by the governor, for terms of four years (§589.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 589, 590 and 591, Florida Statutes, 1941.

**FLORIDA BOARD OF MASSAGE**

Composed of three members, appointed by the governor, for terms of three years. The secretary of the state board of medical examiners shall act as an ex officio member of said board (§480.04, 1947 Supplement, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 480, 1947 Supplement, Florida Statutes, 1941.

**FLORIDA CENTENNIAL COMMISSION (Expired Jan. 1, 1946)****FLORIDA CHILDREN'S COMMISSION**

Composed of not less than fifteen nor more than twenty-one members, appointed by the governor for terms of four years each, except the first commissioners appointed, whose terms are as set out in the statute (§417.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 417, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941.

**FLORIDA CITRUS COMMISSION**

Composed of eleven members, appointed by the governor for terms of two years, such members to be practical citrus fruit men, resident citizens of the State of Florida, seven members who shall be growers not connected with any packing, shipping or marketing organization (§595.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 594, 595 et seq., Florida Statutes, 1941.

**FLORIDA COUNCIL FOR THE BLIND**

Consists of five members, appointed by the governor, for terms of four years (§409.26, Florida Statutes, 1941).

The general powers and duties of the council are set out in §§409.26 and 409.27, Florida Statutes, 1941.

**FLORIDA CRIPPLED CHILDREN'S COMMISSION**

Composed of five members to be appointed by the governor for terms of four years (§391.02, Florida Statutes, 1941).

The powers, duties and qualifications of the commission are set out in chapter 391, Florida Statutes, 1941.

**FLORIDA DRY CLEANING AND LAUNDRY BOARD (Law creating said board repealed in 1943.)****FLORIDA ECONOMIC ADVANCEMENT COUNCIL (Repealed by Ch. 24337, Laws of Florida, 1947)****FLORIDA INDUSTRIAL COMMISSION**

Consists of three members, appointed by the governor, for terms of four years (§440.44, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 440 and 443, Florida Statutes, 1941.

**FLORIDA MILK BOARD (See Milk Commission)****FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION**

Consists of three commissioners, elected by the qualified electors of the state, for terms of four years (§350.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §35, article V, Florida Constitution; chapters 323, 347, 350, 352, 360, 364, and §116.19, Florida Statutes, 1941, and same chapter, 1947 Supplement, Florida Statutes, 1941.

**FLORIDA REAL ESTATE COMMISSION**

Consists of three persons, resident citizens of Florida, to be appointed by the governor for terms of three years (§475.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 475, Florida Statutes, 1941.



**FLORIDA STATE ADVERTISING COMMISSION**

Composed of the governor, commissioner of agriculture, the secretary of state, and six additional members to be appointed by the governor, one from each of the six congressional districts, for terms of four years each, except the first members appointed whose terms are as fixed by statute (§286.11, Florida Statutes, 1941).

The powers and duties of the commission are set out in chapter 286, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941.

**FLORIDA STATE BOARD OF ARCHITECTS**

Composed of five members who are architects, appointed by the governor for terms of four years (§467.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 467, Florida Statutes, 1941.

**FLORIDA STATE BOARD OF CHIROPRACTIC EXAMINERS**

Composed of three members to be appointed by the governor for terms of three years, and who shall be doctors of chiropractic, and who shall be bona fide residents of this state (§§460.01 and 460.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 460, Florida Statutes, 1941.

**FLORIDA STATE BOARD OF DENTAL EXAMINERS**

Composed of five members, appointed by the governor for terms of four years (§466.06, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 466, Florida Statutes, 1941.

**FLORIDA STATE BOARD OF OPTOMETRY**

Composed of five optometrists, residents of this state, appointed by the governor, for terms of four years (§463.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 463, Florida Statutes, 1941, and 1947 Supplement, Florida Statutes, 1941.

**FLORIDA STATE DEFENSE COUNCIL**

Composed of the governor, as chairman, the attorney general and adjutant general, as ex officio members, and other members (number not designated) to be appointed by the governor for terms not exceeding four years each, one of whom is designated by the governor as vice-chairman (§249.03, Florida Statutes, 1941).

The governor is given power, whenever he deems it expedient, by proclamation, to dissolve, suspend or reestablish the defense council (§249.01, Florida Statutes, 1941).

The powers, duties and qualifications of the members of the council are set out in chapter 249, Florida Statutes, 1941.

**FLORIDA STATE IMPROVEMENT COMMISSION**

Composed of five members, one of whom shall be the governor, one of whom shall be the chairman of the state road department, the three other members to be appointed by the governor for terms of four years (§420.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 420, Florida Statutes, 1941.

Formerly the Agricultural and Industrial Relief Commission.

**FORESTRY, FLORIDA BOARD OF (See Florida Board of Forestry)****FUNERAL DIRECTORS AND EMBALMERS, STATE BOARD OF (See State Board of Funeral Directors and Embalmers)****GAME AND FRESH WATER FISH COMMISSION**

Consists of five members appointed by the governor for terms of five years (§30, article IV, Florida Constitution).

The general powers and duties of the commission are set out in the above section of the constitution and chapter 372, Florida Statutes, 1941, and the same chapter in the 1947 Supplement, Florida Statutes, 1941.

**GOVERNOR'S CABINET**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§20, article IV, Florida Constitution). The general powers and duties of the governor's cabinet are set out in §20, article IV, Florida Constitution.

**GULF STATES MARINE FISHERIES COMMISSION**

Consists of three members, appointed by the governor, supervisor of conservation, legislator who is a member of the House of Representatives Committee on Commerce, their terms will terminate at the time each ceases to hold his office, a citizen who has knowledge and interest in marine fisheries problems. Whose term shall be three years and he shall hold office until his successor is appointed and qualified (§374.50, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 374, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941.

**HOTEL COMMISSION**

Consists of a commissioner, appointed by the governor, whose term of office runs concurrently with that of governor (§509.02, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 509, 510 and 511, Florida Statutes, 1941.

**IMMIGRATION, BUREAU OF (See Bureau of Immigration)****INDUSTRIAL COMMISSION, FLORIDA (See Florida Industrial Commission)****INSPECTION, BUREAU OF (See Bureau of Inspection)****INSTITUTE OF GOVERNMENT, TRUSTEES**

Composed of five members, appointed by the governor for terms of four years each, except the first board of trustees whose terms are as fixed by the statute (§241.53, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941).

The general powers and duties of said trustees are set out in §§241.50 to 241.59, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941.

**INSURANCE COMMISSIONER**

The state treasurer is designated as insurance commissioner (§626.01, Florida Statutes, 1941).

The general powers and duties of the insurance commissioner are set out in chapters 625, 626 et seq., Florida Statutes, 1941.

**INTERNAL IMPROVEMENT FUND, TRUSTEES OF THE (See Trustees of the Internal Improvement Fund)****INVESTMENT SECURITIES OF TRUST COMPANIES, BOARD FOR FIXING VALUES OF (See Board for Fixing Values of Investment Securities of Trust Companies)****JUDAH P. BENJAMIN MEMORIAL COMMISSION**

Composed of three citizens of the state appointed by the governor, terms of office not stated (§265.10, Florida Statutes, 1941).

The general powers and duties of the commission are set out in §§265.10-265.12, Florida Statutes, 1941.

**LABOR BUSINESS AGENTS, BOARD FOR LICENSING (See Board for Licensing Labor Business Agents)****LAW EXAMINERS, STATE BOARD OF (See State Board of Law Examiners)**

LIBRARY BOARD, STATE (See State Library Board)

LIVE STOCK SANITARY BOARD, STATE (See State Live Stock Sanitary Board)

MARKETING BOARD, STATE AGRICULTURAL (See State Agricultural Marketing Board)

**MARKETING BUREAU**

Consists of a state marketing commissioner, appointed by the governor, upon recommendation of the commissioner of agriculture, for a term of two years (§603.01, Florida Statutes, 1941).

The general powers and duties of the bureau are set out in §603.09, Florida Statutes, 1941.

MASSAGE, FLORIDA BOARD OF (See Florida Board of Massage)

MEDICAL EXAMINERS, BOARD OF (See Board of Medical Examiners)

MEMORIAL COMMISSION, DADE (See Dade Memorial Commission)

MEMORIAL COMMISSION, JUDAH P. BENJAMIN (See Judah P. Benjamin Memorial Commission)

MEMORIAL COMMISSION, STEPHEN FOSTER (See Stephen Foster Memorial Commission)

MEMORIAL, SPANISH WAR (See Spanish War Memorial)

**MILK COMMISSION**

Consists of milk administrator, appointed by the governor for a term of four years, state health officer, the commissioner of agriculture, a citizen not connected with the milk industry and three members of the milk industry; one a producer, one a distributor and one a producer-distributor appointed by the governor for terms of four years (§501.03, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 501, Florida Statutes, 1941, and in the same chapter in 1947 Supplement, Florida Statutes, 1941.

MOTOR VEHICLE COMMISSIONER, STATE (See State Motor Vehicle Commissioner)

**NATIONAL BOARD OF REVIEW**

Governor may appoint three persons to be members of the national board of review (§521.01, Florida Statutes, 1941).

The national board of review is charged with the examination and approval of motion picture film.

NATUROPATHIC EXAMINERS, STATE BOARD OF (See State Board of Naturopathic Examiners)

NAVAL STORES, SUPERVISORY INSPECTOR OF (See Supervisory Inspector of Naval Stores)

OFFICE, PUBLIC LAND (See Public Land Office)

OSTEOPATHIC MEDICAL EXAMINERS, STATE BOARD OF (See State Board of Osteopathic Medical Examiners)

PARDONS, BOARD OF (See Board of Pardons)

**PAROLE COMMISSION**

Consists of three citizens and residents of this state, appointed by the board of commissioners of state institutions, certified by said board to the senate for confirmation. The members of the commission are appointed for terms of six years (§§947.02 and 947.03, Florida Statutes, 1941; §32, article XVI, Florida Constitution).

The general powers and duties of the commission are set out in chapters 947 and 948, Florida Statutes, 1941, and 1947 Supplement, Florida Statutes, 1941; §32, article XVI, Florida Constitution.

**PENSIONS, STATE BOARD OF** (See State Board of Pensions)

**PHARMACY, BOARD OF, FOR THE STATE OF FLORIDA** (See Board of Pharmacy for the State of Florida)

**PHOTOGRAPHIC EXAMINERS, BOARD OF** (See Board of Photographic Examiners)

**PLANNING BOARD, STATE** (See State Planning Board)

**PLANT BOARD, STATE** (See State Plant Board)

**POLICE OFFICERS' INSURANCE AND ANNUITY FUND, BOARD OF COMMISSIONERS OF THE** (See Board of Commissioners of the Police Officers' Insurance and Annuity Fund)

**PUBLIC LAND OFFICE**

The public land office is under the direction and supervision of the commissioner of agriculture (§26, article IV, Florida Constitution, and §19.13, Florida Statutes, 1941).

The powers and duties of this office are set out in §§19.13-19.24, Florida Statutes, 1941, and §26, article IV, Florida Constitution.

**PUBLIC SAFETY, DEPARTMENT OF** (See Department of Public Safety)

**PUBLIC WELFARE, STATE BOARD OF** (See State Board of Public Welfare)

**RACING COMMISSION, STATE** (See State Racing Commission)

**RAILROAD ASSESSMENT BOARD**

Composed of the comptroller, state treasurer and attorney general (§195.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 195, Florida Statutes, 1941.

**RAILROAD AND PUBLIC UTILITIES COMMISSION** (See Florida Railroad and Public Utilities Commission)

**REAL ESTATE COMMISSION, FLORIDA** (See Florida Real Estate Commission)

**RELIEF COMMISSION, AGRICULTURAL AND INDUSTRIAL** (See Agricultural and Industrial Relief Commission)

**RETIREMENT SYSTEM, BOARD OF TRUSTEES OF TEACHERS'** (See Board of Trustees of Teachers' Retirement System)

**REVENUE, COMMISSIONER OF** (See Commissioner of Revenue)

**SECURITIES COMMISSION**

Composed of the comptroller, state treasurer and attorney general (§517.03, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapter 517, Florida Statutes, 1941.

**SERVICE OFFICER, STATE** (See State Service Officer)



**SOCIAL WELFARE (See State Welfare Board)****SPANISH WAR MEMORIAL**

The Spanish war memorial is under the supervision of the commissioners of state institutions (§265.17, Florida Statutes, 1941).

The general powers and duties are set out in §§265.17-265.22, Florida Statutes, 1941.

**STATE AGRICULTURAL MARKETING BOARD**

Composed of the governor, commissioner of agriculture and the state marketing commissioner (§603.16, Florida Statutes, 1941). The state marketing commissioner is appointed by the governor, upon the recommendation of the commissioner of agriculture, for terms of two years (§603.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§603.16-603.18, Florida Statutes, 1941.

**STATE ARCHEOLOGIST**

Appointed by the governor (term of office not given) (§376.01, Florida Statutes, 1941).

The general powers and duties of the state archeologist are set out in chapter 376, Florida Statutes, 1941.

**STATE AUDITING DEPARTMENT**

Composed of a state auditor and ten assistant state auditors to be appointed by the governor for terms of four years, unless sooner removed by the governor (§21.02, Florida Statutes, 1941).

The powers, duties and qualifications of the state auditor and assistant state auditors are set out in chapter 21, Florida Statutes, 1941.

**STATE BEVERAGE DEPARTMENT**

The principal officer of the department shall be the director, appointed by the governor for a term of four years (§561.05, Florida Statutes, 1941).

The general powers and duties of the department are set out in chapter 561, Florida Statutes, 1941.

**STATE BOARD OF ACCOUNTANCY**

Consists of five persons, each of whom shall be a resident of this state, and shall hold a certificate as a certified public accountant, appointed by the governor for terms of four years (§473.03, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 473, Florida Statutes, 1941.

**STATE BOARD OF ADMINISTRATION**

Composed of the governor, state treasurer and comptroller (§16, article IX, Florida Constitution).

The general powers and duties of the board are set out in §16, article IX, Florida Constitution; §§344.12-344.26, Florida Statutes, 1941, and 1947 Supplement, Florida Statutes, 1941.

**STATE BOARD OF ARCHITECTS, FLORIDA (See Florida State Board of Architects)****STATE BOARD OF BEAUTY CULTURE**

Consists of three members appointed by the governor for terms of three years. Two members of said board shall be women (§477.18, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 477, 1947 Supplement, Florida Statutes, 1941.

**STATE BOARD OF CHIROPODY EXAMINERS (See Board of Chiropractic Examiners)****STATE BOARD OF CHIROPRACTIC EXAMINERS, FLORIDA (See Florida State Board of Chiropractic Examiners)**

**STATE BOARD OF CONSERVATION**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, commissioner of agriculture and superintendent of public instruction (§373.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapters 373-375, Florida Statutes, 1941, and chapter 377, 1947 Supplement, Florida Statutes, 1941.

**STATE BOARD OF CONTROL (See Board of Control)****STATE BOARD OF DENTAL EXAMINERS, FLORIDA (See Florida State Board of Dental Examiners)****STATE BOARD OF EDUCATION**

Composed of the governor, secretary of state, attorney general, state treasurer and superintendent of public instruction (§3, article XII, Florida Constitution).

The general powers and duties of the board are set out in §3, article XII, Florida Constitution and §§229.07 and 229.08, Florida Statutes, 1941.

**STATE BOARD OF ELECTION CANVASSERS**

Composed of the secretary of state, comptroller and attorney general (§99.49, Florida Statutes, 1941).

The general powers and duties of the board are set out in §§99.49-99.51 and 102.47, 102.48, Florida Statutes, 1941.

**STATE BOARD OF ENGINEER EXAMINERS (See Board of Engineer Examiners)****STATE BOARD OF EXAMINERS FOR NURSES**

Consists of five nurses, residents of this state, appointed by the governor for terms of four years (§464.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 464, Florida Statutes, 1941.

**STATE BOARD OF EXAMINERS IN OPTOMETRY (See Florida State Board of Optometry)****STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS**

Consists of the state health officer and four other members to be appointed by the governor for terms of four years (§470.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 470, Florida Statutes, 1941.

**STATE BOARD OF HEALTH**

Composed of three members to be appointed by the governor for terms of four years (§§381.01 and 381.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 381, Florida Statutes, 1941.

**STATE BOARD OF LAW EXAMINERS**

Composed of nine members appointed by the governor, two from each congressional district as they existed on July 1, 1925, and one from the state at large, for terms of three years (§39.04, Florida Statutes, 1941). The powers, duties and qualifications of the board are set out in chapter 39, Florida Statutes, 1941 and the 1947 Supplement, Florida Statutes, 1941.

**STATE BOARD OF MEDICAL EXAMINERS (See Board of Medical Examiners)**

**STATE BOARD OF NATUROPATHIC EXAMINERS**

Composed of three practicing naturopathic physicians, residents of this state, appointed by the governor for terms of four years (§462.02, Florida Statutes, 1941).  
The general powers and duties of the board are set out in chapter 462, Florida Statutes, 1941, and 1947 Supplement, Florida Statutes, 1941.

**STATE BOARD OF OSTEOPATHIC MEDICAL EXAMINERS**

Consists of six regularly licensed osteopathic physicians, appointed by the governor, for terms of three years (§459.05, Florida Statutes, 1941).  
The general powers and duties of the board are set out in chapter 459, Florida Statutes, 1941.

**STATE BOARD OF PENSIONS**

Composed of the governor, comptroller and state treasurer (§291.01, Florida Statutes, 1941).  
The general powers and duties of the board are set out in chapter 291, Florida Statutes, 1941.

**STATE BOARD OF PHARMACY** (See Board of Pharmacy for the State of Florida)**STATE BOARD OF PUBLIC WELFARE**

Composed of seven members to be appointed by the governor for terms of four years (§409.01, Florida Statutes, 1941).  
The powers, duties and qualifications of the board are set out in chapters 409, 412 and 413, Florida Statutes, 1941.

**STATE BOARD OF VETERINARY EXAMINERS** (See Board of Veterinary Examiners)**STATE BOARD OF VOCATIONAL EDUCATION**

Composed of the governor, secretary of state, state treasurer, attorney general and superintendent of public instruction (§229.08, Florida Statutes, 1941).  
The general powers and duties of the board are set out in §229.08, Florida Statutes, 1941.

**STATE BUDGET COMMISSION**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, commissioner of agriculture and state superintendent of public instruction (§216.01, Florida Statutes, 1941).  
The general powers and duties of the commission are set out in chapter 216, Florida Statutes, 1941, and §192.51, 1947 Supplement, Florida Statutes, 1941.

**STATE FIRE MARSHAL**

The state treasurer is ex officio state fire marshal (§633.01, Florida Statutes, 1941).  
The general powers and duties of the state fire marshal are set out in chapter 633, 1947 Supplement, Florida Statutes, 1941.

**STATE HOUSING BOARD**

Composed of the governor, comptroller, state treasurer, attorney general and commissioner of agriculture (§424.04, Florida Statutes, 1941).  
The general powers and duties of the board are set out in chapter 424, Florida Statutes, 1941.

**STATE LIBRARY BOARD**

Composed of three members appointed by the governor for terms of four years (§§257.01 and 257.02, Florida Statutes, 1941).  
The general powers and duties of the board are set out in chapter 257, Florida Statutes, 1941.

**STATE LIVE STOCK SANITARY BOARD**

Composed of seven practical livestock men, residents of the state, appointed by the governor for terms of four years (§585.02, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 585, Florida Statutes, 1941.

**STATE MOTOR VEHICLE COMMISSIONER**

Appointed by the governor for a term of four years (§318.01, Florida Statutes, 1941).

The general powers and duties of the commissioner are set out in chapter 318, Florida Statutes, 1941.

**STATE PAROLE COMMISSION (See Parole Commission)****STATE PLANNING BOARD**

Composed of the secretary of state, the chairman of the state road department and three members, to be appointed by the governor, for terms of four years each (§419.01, Florida Statutes, 1941).

The powers, duties, and the qualifications of the three members of the board to be appointed by the governor, are set out in §§419.02-419.12, Florida Statutes, 1941.

**STATE PLANT BOARD**

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida and one from Middle South Florida, appointed by the governor for terms of four years (§581.01, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 581, Florida Statutes, 1941.

**STATE RACING COMMISSION**

Consists of five members appointed by the governor for terms of two years (§550.01, Florida Statutes, 1941).

The general powers and duties of the commission are set out in chapters 550 and 551, Florida Statutes, 1941.

**STATE RAILROAD COMMISSION (See Florida Railroad and Public Utilities Commission)****STATE ROAD DEPARTMENT**

Consists of five members appointed by the governor for terms of four years (§341.01, Florida Statutes, 1941).

The general powers and duties of the department are set out in chapters 317, 331, 341, 379, §§208.09, 350.75, 952.16-952.21, Florida Statutes, 1941.

**STATE SERVICE OFFICER**

Appointed by the governor for a term of four years (§292.02, Florida Statutes, 1941).

The general powers and duties of the state service officer are set out in chapter 292, Florida Statutes, 1941.

**STATE SOIL CONSERVATION BOARD**

Consists of five citizens of this state, one from East Florida, one from South Florida, one from West Florida, one from Middle Florida and one from Middle South Florida, appointed by the governor for terms of four years (§582.06, Florida Statutes, 1941).

The general powers and duties of the board are set out in chapter 582, Florida Statutes, 1941.

**STATE TEXTBOOK PURCHASING BOARD**

Composed of the governor, secretary of state, attorney general, comptroller, state treasurer, superintendent of public instruction and commissioner of agriculture (§233.13, Florida Statutes, 1941).

The powers and duties of the board are set out in §§233.13 and 233.26, Florida Statutes, 1941.



**STATE TUBERCULOSIS BOARD**

Composed of three members to be appointed by the governor for terms of four years (§392.01, Florida Statutes, 1941).  
The powers, duties and qualifications of the board are set out in §§392.02-392.14, Florida Statutes, 1941.

**STATE VETERANS COMMISSION (See Department of Veterans Affairs)****STATUTORY REVISION DEPARTMENT**

This department is under the supervision and direction of the attorney general (§16.43, 1947 Supplement, Florida Statutes, 1941).  
The powers and duties of the department are set out in §§16.44-16.51, 1947 Supplement, Florida Statutes, 1941.

**STEPHEN FOSTER MEMORIAL COMMISSION**

Composed of five members, citizens and residents of the state, appointed by the governor, for terms of four years (§265.13, Florida Statutes, 1941).  
The general powers and duties of the commission are set out in §§265.13-265.16, Florida Statutes, 1941.

**STRUCTURAL PEST CONTROL BOARD**

Composed of five members, appointed by the governor for terms of three years each, except the first board whose terms are as provided by the statute (§482.07, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941).  
The general powers and duties of the commission are set out in chapter 482, Florida Statutes, 1941, 1947 Supplement, Florida Statutes, 1941.

**SUMMER SCHOOLS, BOARD TO NAME TEACHERS FOR (See Board to Name Teachers for Summer Schools)****SUPERVISING INSPECTOR OF NAVAL STORES**

The supervising inspector and inspectors of naval stores are appointed by the governor, no term of office being stated (§523.08, Florida Statutes, 1941).  
The general powers and duties of the inspector are set out in chapter 523, Florida Statutes, 1941.

**SUPERVISION AND REGULATION OF FORMS FOR ASSUMPTION OF RISKS BY SURETY COMPANIES, BOARD FOR (See Board for Supervision and Regulation of Forms for Assumption of Risks by Surety Companies)****SUPREME COURT BUILDING COMMISSION**

Consists of the governor, comptroller, attorney general, a justice of the supreme court and three citizens to be appointed by the governor (§255.06, Florida Statutes, 1941).  
Powers and duties of this commission are set out in §§255.06-255.11-3, Florida Statutes, 1941, and 1947 Supplement, Florida Statutes, 1941.

**TEACHERS FOR SUMMER SCHOOLS, BOARD TO NAME (See Board to Name Teachers for Summer Schools)****TEXTBOOK PURCHASING BOARD, STATE (See State Textbook Purchasing Board)****TEXTBOOK RATING COMMITTEE**

Composed of seven members appointed by the state board of education, upon the recommendation of the superintendent of public instruction, and of the superintendent of public instruction and members of his department designated by him (§233.07, Florida Statutes, 1941).  
The powers, duties and qualifications of the committee are set out in §§233.07-233.11 et seq., Florida Statutes, 1941.

THE POLICE OFFICERS' INSURANCE AND ANNUITY FUND, BOARD OF COMMISSIONERS OF (See Board of Commissioners of the Police Officers' Insurance and Annuity Fund)

TRUSTEES OF TEACHERS' RETIREMENT SYSTEM, BOARD OF (See Board of Trustees of Teachers' Retirement System)

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND

Composed of the governor, comptroller, state treasurer, attorney general and commissioner of agriculture (§253.02, Florida Statutes, 1941). The general powers and duties of the trustees are set out in chapters 253 and 270 and §§192.38-192.50, 285.02 and 331.05, Florida Statutes, 1941, and other laws.

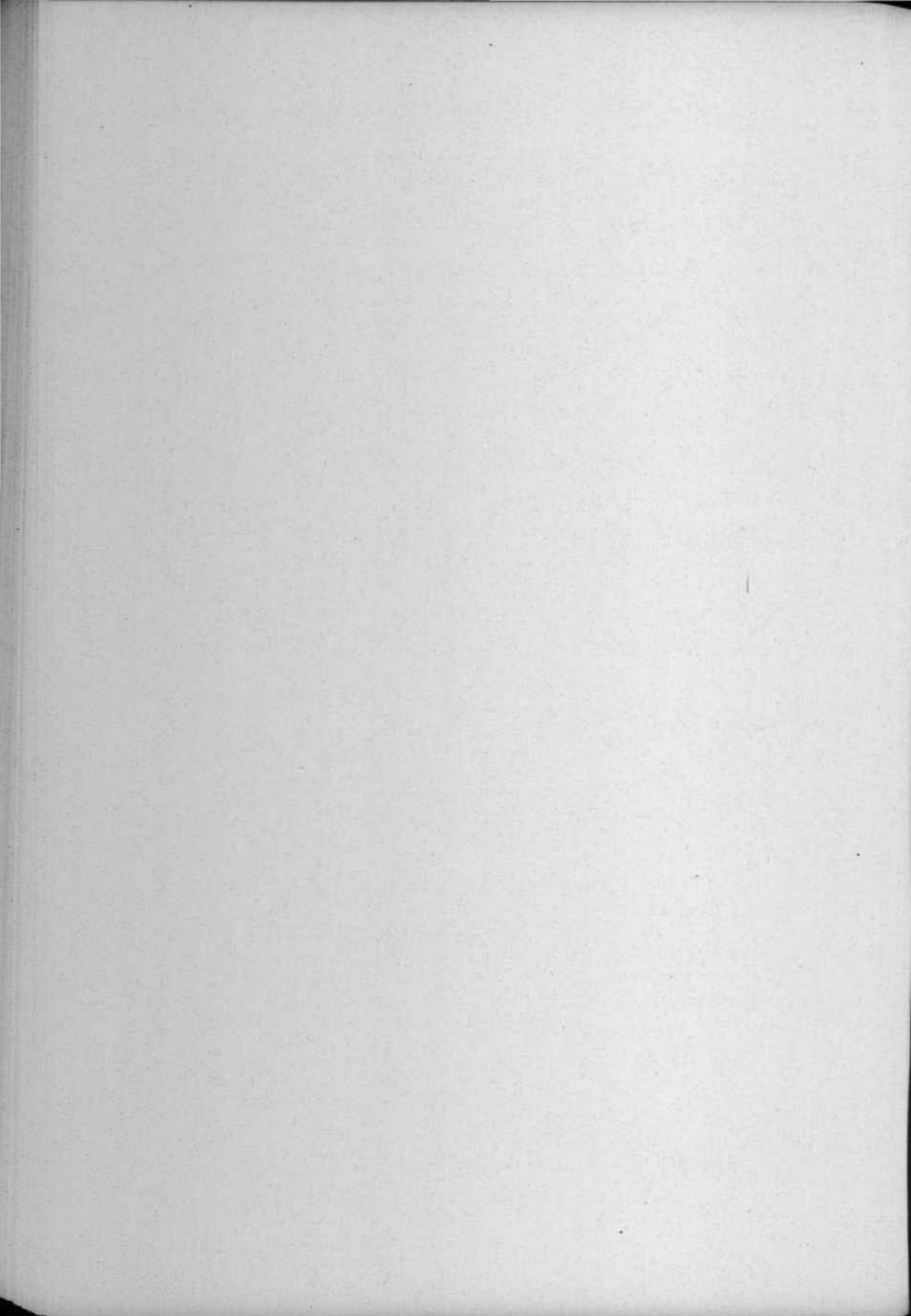
TUBERCULOSIS BOARD, STATE (See State Tuberculosis Board)

UNIFORM STATE LAWS, COMMISSIONERS ON (See Commissioners on Uniform State Laws)

VETERINARY EXAMINERS, BOARD OF (See Board of Veterinary Examiners)

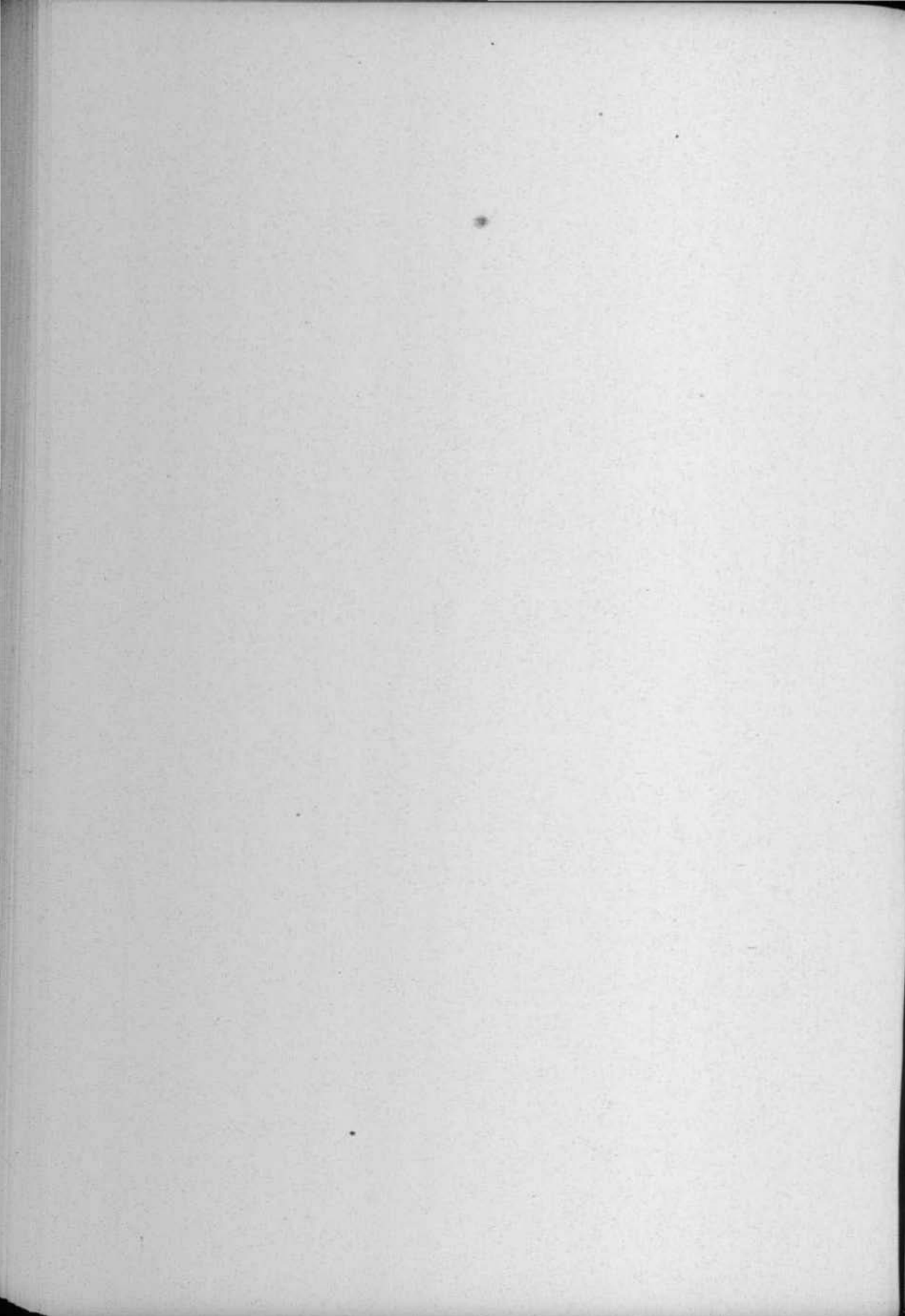
VITAL STATISTICS, BUREAU OF (See Bureau of Vital Statistics)

VOCATIONAL EDUCATION, STATE BOARD OF (See State Board of Vocational Education)



## **PART III**





## 1948 CONSTITUTIONAL AMENDMENTS

The 1947 Session of Legislature provided that twelve proposed amendments to the Florida Constitution be submitted to the electors at the general election in 1948. One of these proposed amendments was eliminated by the electorate of Dade county, prior to the general election; three of these proposed amendments were defeated and eight were adopted. So far as I am advised there have been no court decisions affecting these amendments since their adoption.

**Section 4, Article III.**—This section sets the pay of the members of the Legislature at ten dollars per day; a subsistence allowance of not more than seven dollars and fifty cents per day, provision is also made for the payment of mileage from the legislator's home to the seat of government for a designated number of round trips.

**Section 46, Article V.**—This section pertains to retirement of justices of the supreme court and judges of the circuit court. Authority is granted for these judicial officers to retire instead of resigning; if one does retire he shall be qualified to continue to perform all the functions of his respective office, when called upon to do so by the chief justice, in the case of a supreme court justice, or by the senior circuit judge of his circuit, in the case of a circuit court judge. Neither a retired supreme court justice nor a circuit court judge shall be required to perform these duties without his consent.

**Section 48, Article V.**—This section relates to the election of the judge of the Court of Record of Escambia county. This section provides that the judge of the Court of Record of Escambia county, who is elected in 1950 and at each subsequent election will be elected for a period of six years.

**Section 13 (14)\* and 14 (15)\*, Article VIII.**—These sections pertain to St. Lucie county. \*The 1947 Legislature erroneously numbered these sections, they should have been numbered as indicated by the numbers contained in parenthesis. This amendment abolishes the offices of certain tax assessors and collectors, and designates the county tax assessor and county tax collector as the sole assessing and collecting authorities within the county. This amendment is not self executing but requires the Legislature in 1949, and from time to time thereafter, to specify the powers and duties of these county offices. It is also required that the powers and duties designated by the Legislature be submitted to the electors of the county at a referendum election. The effective date is January 1, 1950.

**Sections 16 and 17, Article VIII.**—These sections pertain to Volusia county. This amendment abolishes the offices of certain tax assessors and collectors, and designates the county tax assessor and county tax collector as the sole assessing and collecting authorities within the county. This amendment is not self executing but requires the Legislature in 1949, and from time to time thereafter, to specify the powers and duties of these county offices. The effective date is January 1, 1950.

**Sections 18 and 19, Article VIII.**—These sections pertain to Broward county. The 1947 Legislature authorized the secretary of state to designate the number of these sections and he has designated them as shown herein. This amendment abolishes the offices of certain tax assessors and collectors, and designates the county tax assessor and county tax collector as the sole assessing and collecting authorities within the county. This amendment is not self executing but requires the Legislature in 1949, and from time to time thereafter, to specify the powers and duties of these county offices. The effective date is January 1, 1950.

**Sections 13 (20)\* and 14 (21)\*, Article VIII.**—These sections pertain to Pinellas county. \*The 1947 Legislature erroneously numbered these sections, they should have been numbered as indicated by the numbers contained in parenthesis. This amendment abolishes the offices of certain tax assessors and collectors, and designates the county tax assessor and county tax collector as the sole assessing and collecting authorities within the county. This amendment is not self executing but requires the Legislature in 1949, and from time to time thereafter, to specify the powers and duties of these county offices. It is also required that the powers and duties designated by the Legislature be submitted to the electors of the county at a referendum election. The effective date is January 1, 1950.

**Section 1, Article XVII.**—This section relates to the amending of the constitution of the State of Florida. This amendment authorizes the revision or amendment of any portion of the constitution; the revision or amendment may relate to more than one subject but no amendment shall consist of more than one revised article of the constitution.

## 1947 ENACTMENTS OF GENERAL INTEREST

**Sections\* 7.17 and 7.46, or chapter 23867, Laws of Florida, acts of 1947,** made a slight change in the common boundary between Escambia and Okaloosa counties, Florida.

**Section 14.14, or chapter 23697, Laws of Florida, acts of 1947,** provides that the duties of the governor of the State of Florida shall devolve upon the secretary of the state in case of the death, removal or disability of the governor to act and there is neither a president of the senate nor a speaker of the house able to act.

**Sections 14.15 to 14.18, or chapter 24291, Laws of Florida, acts of 1947,** provides for a special election for governor in case the governor elect dies or becomes disqualified. These statutes provide that the president of the Senate shall act as governor until one is elected, as aforesaid. These statutes were evidently designed to prevent an occurrence in this state similar to that in Georgia when the last governor elect died prior to taking office.

**Sections 16.19 to 16.23, or chapter 24337, Laws of Florida, acts of 1947,** adopts and reenacts the Florida Statutes, 1941, including therein the laws of general operation of the 1941, 1943 and 1945 sessions of the Legislature, at the same time correcting errors, etc. therein.

**Section 17.13, or chapter 24280, Laws of Florida, acts of 1947,** provides circumstances under which lost or destroyed state warrants will be duplicated by the state comptroller.

**Section 17.27, or chapter 23909, Laws of Florida, acts of 1947,** enables the state comptroller to microfilm general correspondence files more than three years old and destroy said files. Photographs and microphotographs of such instruments may be used in evidence to the same extent that such files might have been used. It might be advisable that this law be extended to other departments and agencies of the state government.

**Sections 18.10 and 18.11, or chapters 23938 and 23976, Laws of Florida, acts of 1947,** amended the statutes relating to the deposit of state funds in banks and the giving of security therefor by the bank.

**Sections 25.48 to 25.52, or chapter 24042, Laws of Florida, acts of 1947,** authorized the Board of Commissioners of State Institutions to enter

\* All section references are to 1947 Cumulative Supplement to Florida Statutes, 1941.

into a contract for the publication of the supreme court reports with any reputable publishing house in lieu of publishing the same under contract with some printer as has been the custom in the past.

**Section 28.29, or chapter 23825, Laws of Florida, acts of 1947,** provides that only orders finally disposing of actions at law and suits in equity need to be recorded in order to be effective.

**Sections 32.01 to 32.34, or chapter 24107, Laws of Florida, acts of 1947,** revises the statutes and laws relating to the criminal courts of record and places the same in the Florida Statutes so as to be available to all lawyers and residents of the State of Florida.

**Section 34.20, or chapter 24037, Laws of Florida, acts of 1947,** changed the statutory salary of judges of the county courts from nine hundred dollars per annum to eighteen hundred dollars.

**Section 39.35, or chapter 23816, Laws of Florida, acts of 1947,** authorizes all lawyers, duly admitted to practice in this state, to practice law before any board, bureau or commission of this state without examination or admission to practice granted by said board, bureau or commission.

**Section 45.19, or chapter 23965, Laws of Florida, acts of 1947,** amended the existing law so as to provide for the dismissal of actions at law or suits in equity where there has been no prosecution thereof for one year. The prior law provided dismissal where no prosecution was made for a three-year period. The application of this amendment is only to suits filed after October 1, 1947.

**Section 49.06, or chapter 23663, Laws of Florida, acts of 1947,** raised the legal amount chargeable for legal and official advertisement from fifty and twenty-five cents per square inch to seventy and forty cents per square inch.

**Section 51.12, or chapter 24199, Laws of Florida, acts of 1947,** prescribes the requirements for alleging operation of a motor vehicle in declarations for damages due to the negligent operation of motor vehicles by persons other than the owner.

**Section 59.45, or chapter 23826, Laws of Florida, acts of 1947,** provides relief for parties who misconceive their remedy for review by the supreme court. Where an appeal is taken when the remedy is by certiorari the notice of appeal and record shall be considered as a petition for certiorari.

**Sections 66.28 to 66.47, or chapter 24099, Laws of Florida, acts of 1947,** adopted an additional method of quieting title in this state. These sections were patterned after a California act enacted soon after the San Francisco earthquake and fire, which was upheld by the United States Supreme Court.

**Sections 72.31 to 72.39, or chapter 23891, Laws of Florida, acts of 1947,** provides for the adoption of adult persons.

**Section 90.23, or chapter 23896, Laws of Florida, acts of 1947,** provides for expert witnesses in civil cases and provides for fixing their compensation, which may be taxed as costs.

**Section 91.30, or chapter 24041, Laws of Florida, acts of 1947,** authorizes the use of expert witnesses in civil cases and provides for the fixing of their compensation.

**Section 95.35, or chapter 24292, Laws of Florida, acts of 1947,** fixes a terminal date for contracts to sell and convey real property, entered into prior to July 1, 1927, where there is no terminal date fixed therein.



**Section 99.58, or chapter 23957, Laws of Florida, acts of 1947,** requires that candidates for two or more similar offices, including two or more members in the Legislature from the same county, or two or more places on the supreme court and similar offices, shall run in groups and be voted on in groups.

**Section 102.36, or chapter 24163, Laws of Florida, acts of 1947,** regulates the nomination of candidates for circuit judge.

**Section 102.73, or chapter 24103, Laws of Florida, acts of 1947,** provides the manner for holding special primary elections in those cases where there is a vacancy in an elective office which may not be filled by appointment.

**Sections 121.01, et seq., or chapter 23958, Laws of Florida, acts of 1947,** revised several sections of the laws relating to the state officers and employees' retirement system. These revised sections extended the operation of the system in some features and made some corrections in the laws.

**Sections 125.35 to 125.41, or chapters 23829 and 23831, Laws of Florida, acts of 1947,** authorize boards of county commissioners to sell and convey real property of the county under certain conditions. Prior to the enactment of this law there was no general power in the county commissioners to sell and convey county lands other than county tax delinquent lands.

**Sections 134.01, et seq., or chapter 23959, Laws of Florida, acts of 1947,** revised several sections of the law relating to the county officers and employees' retirement system. These revised sections extended the operation of the system in some features and made some corrections in the laws.

**Sections 228.15, et seq., or chapter 23726, Laws of Florida, acts of 1947,** amended several sections of the school code. The purpose of this amendment appears to have been to remove certain difficulties, conflicts and defects contained in the said school code. Said chapter 23726 appears to have amended more than fifty sections of the said school code and laws supplemental thereto and repealed about twenty-one sections of said code.

**Sections 230.04, 230.06, 230.08 and 230.09, or sections 5, 6, 7 and 8 of chapter 23726, Laws of Florida, acts of 1947,** provide that the county board shall consist of five members in each county, from what territories they shall be elected, the arrangement of their terms, etc.

**Section 230.25, or section 10 of chapter 23726, Laws of Florida, acts of 1947,** made changes in the qualifications for the office of county superintendent. The act was attacked on the ground that it discriminated between present incumbents and others seeking the office, and also on the ground of defective title to the act as to matters contained in this section. The circuit court of Dade county held the act unconstitutional. Several other counties where the problem arose followed the Dade County Circuit Court ruling and disregarded the discriminating features of the act.

**Section 230.34, or section 12 of chapter 23726, Laws of Florida, acts of 1947,** in some respects, was the greatest change in the school laws. It consolidated all school districts into one. There was no direct litigation, but promptly upon its passage many rural school districts quickly issued bonds to raise money for construction of school buildings, fearing that after the consolidation of districts the chances of getting a school in their area would be diminished.

**Section 236.02, or section 27 of chapter 23726, Laws of Florida, acts of 1947,** covers the numerous requirements for participation in the foundation program set up in chapter 23726. Subparagraph 3 requires payment of all instructional personnel over a period of twelve calendar months, except as otherwise authorized by the State Board. The question arose as to

whether the ten months' teachers were entitled to payment for the months of July and August at the beginning of the school year. After the attorney general's ruling that the teachers were entitled to payment of the salary for the months of July and August at the beginning of the school year, suit was filed in Dade county for court determination of the question. That court reached the same conclusion as the attorney general, as did, also, the Supreme Court of Florida. (See *Weiss v. Leonardy*, 36 So. (2) 184.) Subsequently the State Board of Education authorized county boards to require indemnity where they deemed it necessary to protect themselves from losses by reason of payment of teachers in advance of actual teaching.

**Sections 239.01, et seq., or chapter 23726, Laws of Florida, acts of 1947**, amended several sections of the statutes relating to higher education so as to change the name of the Florida State College for Women to Florida State University and make both the University of Florida and the Florida State University coeducational institutions. Said chapter 23726 appears to have amended more than fifty sections of the statutes relating to higher education and repealed about twenty or more of said sections.

**Section 264.16, or chapter 23616, Laws of Florida, acts of 1947**, made an appropriation of two million dollars of state funds to the United States to be used by the United States in connection with the establishment of a national park in this state to be designated as the Everglades National Park.

**Section 265.16-1, or chapter 23940, Laws of Florida, acts of 1947**, made an appropriation of five hundred thousand dollars for the purpose of establishing a Stephen Foster Memorial in this state.

**Sections 282.01 to 282.22, or chapter 23915, Laws of Florida, acts of 1947**, made the biennial appropriation for the operation of the state between July 1, 1947 and June 30, 1949.

**Sections 282.24 to 282.26, or chapter 23882, Laws of Florida, acts of 1947**, provides an appropriation for certain post war construction by the State of Florida. This is a continuation of the appropriations for a similar purpose made by chapter 22820, Laws of Florida, acts of 1945. The appropriations under the 1947 act is more restricted than are the ones under the 1945 act.

**Sections 295.07 to 295.13, or chapter 24201, Laws of Florida, acts of 1947**, provides preferences, in certain employment and appointments under the laws of this state, for war veterans and ex-service men and women.

**Section 318.09, or chapter 23666, Laws of Florida, acts of 1947**, authorizes the state motor vehicle commissioner to microfilm certain records in his office and destroy the originals. Reproductions made from such microfilm may be used in evidence to the same extent as the original might have been.

**Sections 319.20 to 319.34, or chapter 23658, Laws of Florida, acts of 1947**, is a virtual revision of existing laws governing and pertaining to the certification and registration of motor vehicles; transfer of title thereto and preservation of liens thereon. This statute became effective October 1, 1948. The purpose of the statute is to facilitate the motor vehicle commissioner in his administration of the motor vehicle laws to compose inconsistent and conflicting provisions of existing laws and to produce equality and uniformity of the laws applied to ownership, purchase and sale of motor vehicles. The statute will result in the solution of many perplexing questions which have arisen under prior laws and greatly facilitate the commissioner in the efficient administration of the department.

**Section 320.27, or chapter 23660, Laws of Florida, acts of 1947**, is intended to extend and unify the regulation of the business of the purchase and sale of used motor vehicles and to meet and combat certain vicious

practices existing in connection with such business which affords opportunity for fraudulent transactions. It is also intended to reduce the increasing volume of cases of motor vehicle theft. It greatly strengthens prior laws and will prove of incredible benefit to the dealers and public alike.

**Sections 321.04, 321.05, et seq., were amended by chapters 23724 and 24151, Laws of Florida, acts of 1947, for the purpose of broadening and extending the power of the director and members of the Florida Highway Patrol with respect to the apprehension and arrest of persons charged with law violation beyond the scope of traffic laws and laws governing the use of the highways. The purpose of this act was practically defeated by the addition of reservations by which the authority of patrol officers is circumscribed.**

**Sections 324.01 to 324.19, or chapter 23636, Laws of Florida, acts of 1947, establishes a motor vehicle responsibility law for the clear purpose of insuring persons operating motor vehicles upon the highways against loss or damage resulting from the illegal or negligent operation of motor vehicles by persons who are not financially able to respond in damages in the event of a collision or other casualty. The statute in its present form has some infirmities resulting from indefiniteness of the language used, the uncertainty of legislative intent and the want of provision whereby the purpose of the act may be achieved.**

**Sections 330.01 to 330.26, or chapter 24045, Laws of Florida, acts of 1947, provides for the registration and licensing of aircraft in this state. These statutes classify aircraft as "motor vehicles." The law is designed to follow as closely as is consistent, the regulatory provisions of the motor vehicle law. They are weak spots in the law which are a necessary result of an endeavor to classify two materially different instrumentalities under one classification. Many questions are anticipated wherein personal rights and liberties may be involved growing out of arbitrary classification for the purpose of regulation. The statute has not been before the court for construction or otherwise.**

**Sections 343.34 to 343.46, or chapters 23963 and 24205, Laws of Florida, acts of 1947, provide new and additional procedures for abandoning and closing county highways and roads.**

**Sections 350.01-1, or chapter 24095, Laws of Florida, acts of 1947, changed the name of the Florida Railroad Commission to the Florida Railroad and Public Utilities Commission.**

**Section 350.76, or chapter 23788, Laws of Florida, acts of 1947, authorizes the Florida Railroad and Public Utilities Commission to microfilm certain of their records and destroy the same. Copies produced from said microfilms are admissible in evidence to the same extent as the original could have been used in evidence.**

**Section 374.14 was amended by chapter 23777, Laws of Florida, acts of 1947, to meet a situation which had become extremely critical between the States of Florida and South Carolina with regard to the reciprocal rights of those engaged in the business of fishing for shrimp and prawn in the waters of the respective states. All efforts to secure a reciprocal agreement with South Carolina had failed. As a result of the enactment the situation was solved and a reciprocal agreement will be perfected shortly which will be of great benefit to the shrimp industry in this state.**

**Section 374.21 as amended by chapter 24367, Laws of Florida, acts of 1947, relating to the St. Johns river, and chapter 24173, Laws of Florida, acts of 1947 (which chapter in effect appears to have affected an amendment by implication of section 374.20 relating to Lake Okeechobee) redefine the waters of St. Johns river and Lake Okeechobee as salt waters and regulate the taking and disposition of fish and fish products there-**

from. These statutes were evidently intended to set at rest a controversial question between the Board of Conservation and the Game and Fresh Water Fish Commission, with regard to jurisdiction over fish and fishing in said bodies of water. These acts were held invalid and the question of jurisdiction resolved in favor of the Game and Fresh Water Fish Commission, by the Supreme Court of Florida, in cases involving these statutes. (See *Beck v. Game & Fresh Water Fish Commission*, 33 So. 2d. 594; *Revels v. DeGoyler*, 33 So. 2d. 719; and *Game & Fresh Water Fish Commission v. State Board of Conservation*, 33 So. 720.)

**Section 374.49, or chapter 24353, Laws of Florida, acts of 1947,** authorizes the State of Florida to enter into a compact with other states bordering on the Gulf of Mexico for the purpose of promoting utilization of the fisheries, marine and shell, of the Gulf seaboard, similar to the existing compact among the states bordering the Atlantic seaboard, which has proven of great value in the development of the fisheries and fishing industry in this state.

**Sections 375.34 to 375.47, or chapter 24121, Laws of Florida, acts of 1947,** authorizes the creation of oyster cultivation districts in this state for the purpose of planting and propagation and the development of oyster cultivation by the application of recognized scientific methods and practices. The purpose of the statute is to encourage greater development of a recognized resource of this state.

**Section 392.15, or chapter 23627, Laws of Florida, acts of 1947,** provides an additional appropriation for tubercular sanatoria in the sum of \$2,500,000.00 from the general revenue fund of the state. This section appears to contemplate the construction of about five additional tubercular sanatoria.

**Sections 395.01 to 395.17, or chapter 24091, Laws of Florida, acts of 1947,** provides for the licensing and regulation of public hospitals within this state.

**Sections 399.01 to 399.13, or chapter 24096, Laws of Florida, acts of 1947,** provides for the inspection and regulation of elevators in buildings used by the public in this state.

**Sections 417.01 to 417.05, or chapter 23810, Laws of Florida, acts of 1947,** establishes a Florida Children's Commission and fixes its jurisdiction and authorities in connection with child welfare.

**Sections 449.01 to 449.16, or chapter 24080, Laws of Florida, acts of 1947,** regulates the conduct of private employment agencies within this state and places such regulation under the jurisdiction of the Florida Industrial Commission.

**Sections 453.01 to 453.18, or chapter 23911, Laws of Florida, acts of 1947,** provides for arbitration in connection with labor and other disputes relating to public utilities. These sections are usually referred to as the "Public Utility Arbitration Law."

**Sections 482.01 to 482.17, or chapter 23364, Laws of Florida, acts of 1947,** regulates structural pest control in this state and seems to include fumigation and other means of insect, rodent and other pest control in this state. The execution of this law appears to be under the jurisdiction of the State Board of Health but the licensing of persons doing pest control work is under the jurisdiction of a special board created by the said statute.

**Section 510.40, as amended by chapter 23931, Laws of Florida, acts of 1947,** has for its purpose the limitation of liability of hotel proprietors for loss of personal property of a guest through the fault, negligence or want of care of such proprietor, his employees or agents.



**Sections 526.12 to 526.20, or chapter 24302, Laws of Florida, acts of 1947,** regulates the business of dealing in liquefied petroleum gases, the manufacture and dealing in equipment for distributing and using such gases, and the installation of the same. This legislation was deemed necessary because of the hazardous nature of the product involved. This law is incomplete in its present form and doubtless will be amended. The said law contains no adequate enforcement provisions.

**Section 562.02 was amended by chapter 23746, Laws of Florida, acts of 1947,** so as to make it unlawful for the holder of a beverage license to have in his possession, or to permit anyone else to have in his possession, at or in the place of business of any such licensee any beverage containing more than one per cent of alcohol by weight which is not permitted to be sold by the licensee under his license.

**Section 562.11 was amended by section 15 of chapter 23746, Laws of Florida, acts of 1947,** so as to make it unlawful for any person or firm, or the officers, agents or employees of any corporation, to sell, give, serve, or permit to be served alcoholic beverages to minors. Prior to amendment, this section made it unlawful for a licensee to sell, give, serve, or permit to be served, intoxicating liquors, wines or beer to minors.

**Sections 567.01, 567.06, 567.07, 567.12 and 567.13, or chapter 23747, Laws of Florida, acts of 1947,** amended the local option election laws and extended said elections to not only the question of the sale of intoxicating liquors but whether or not such sales should be limited to package sales only. These sections made a material change in the existing laws.

**Section 595.07, as amended by chapter 23680, Laws of Florida, acts of 1947,** enlarged the existing powers of the Florida Citrus Commission, with regard to the adoption and enforcement of rules and regulations governing the artificial coloring of citrus fruit by the "color added" processes. Under the law in effect at the time of the amendment the commission was without authority to regulate the methods by which the "color added" processes might be employed. This situation caused confusion and uncertainty attendant upon regulation of processing citrus fruit, which was to a great extent dissipated by the exercise by the commission of the authority conferred by the amendment.

**Sections 622.01 to 622.07, or chapter 23897, Laws of Florida, acts of 1947,** provides circumstances and the conditions under which foreign unincorporated associations may do business in this state.

**Sections 634.01 to 634.16, or chapter 24086, Laws of Florida, acts of 1947,** provides for the licensing of local insurance agents and regulates such agents.

**Sections 636.01 to 636.16, or chapter 23966, Laws of Florida, acts of 1947,** provides for the licensing of insurance adjusters and regulates such adjusters.

**Section 637.60, as amended by chapter 23821, Laws of Florida, acts of 1947,** enlarged the tax exemption provisions theretofore contained in said section so as to include the premium receipts tax imposed by subsection (2) of section 205.43, as amended. These amendments were brought on by reason of the decision of the United States Supreme Court in the South-Eastern Underwriters case (322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440), and is intended to uniformly subject insurers, foreign and domestic, in this state to the payment of premium receipt taxes.

**Section 640.11, as amended by chapter 23961, Laws of Florida, acts of 1947,** provides the manner whereby the guaranty reserve fund of mutual assessment insurance companies, which have transferred into legal reserve or level premium companies under section 640.29 may be disbursed to or for the benefit of policy holders. Prior to 1945 it was recognized that as-

assessment insurance, provided by mutual benefit associations and similar organizations, was not sound, so that at the 1945 session of the Florida Legislature a statute was enacted requiring that all such associations either transfer into legal reserve or level premium companies or cease to do business in this state. At the time of the meeting of the 1947 Legislature only one of these associations was operating in this state, it having transferred into a legal reserve or level premium company pursuant to the 1945 enactment.

**Sections 642.01 to 642.10, or chapter 24087, Laws of Florida, acts of 1947,** regulates the business of accident and sickness insurance and place the jurisdiction of such regulation under the Insurance Commissioner of this State.

**Sections 643.01 to 643.13, or chapter 24202, Laws of Florida, acts of 1947,** provided a fair trade practice law for the insurance business of this state and supplemented existing regulations relating to insurance. The need for adequate regulation of the insurance business in this state was prompted by public law 15 (act of March 9, 1945), of the Congress of the United States, which law in effect gave the states until January 1, 1948, to provide adequate controls over the insurance business within such states, which law was held valid in the case of *Prudential Insurance Company v. Benjamin*, ..... U.S. ...., S. Ct. ...., 90 L. Ed. 1342. The 1947 state law was intended as an attempt to meet the requirements of the foregoing enactment of the Congress.

**Section 715.01, or chapter 24313, Laws of Florida, acts of 1947,** provides that the title to personal property found in or upon public conveyances, premises used for business purposes, parks, places of amusement, public recreation areas and other places open to the public vests in the finder, unless called for or claimed by the rightful owner within six months after the finding thereof. With reference to personal property found by employees of public transportation systems, such employees are deemed agents of the transportation system and the transportation system takes title to such property if unclaimed.

**Section 749.01 was amended by section 1 of chapter 24285, Laws of Florida, acts of 1947,** so as to change the penalty for rape. Formerly the penalty was death or imprisonment in the state prison for life. Now it is "death, unless a majority of the jury in their verdict recommend mercy, in which event punishment shall be by imprisonment in the State Prison for life, or for any term of years within the discretion of the judge."

**Section 806.12, or section 1 of chapter 24299, Laws of Florida, acts of 1947,** provides that all offenses created by chapter 806 (arson and allied felonies), shall be prosecuted within five years after the same shall have been committed. Prior to this amendment such offenses had to be prosecuted within two years under section 832.05.

**Section 817.37, or chapter 24344, Laws of Florida, acts of 1947,** defines and provides for the punishment of "race track touts."

**Section 838.09, or section 1 of chapter 23956, Laws of Florida, acts of 1947,** makes it a felony to bribe an employee or attache of the Legislature. It prohibits anyone from corruptly giving, offering or promising to any employee or attache of the Legislature anything of value with intent to induce such employee or attache to exert his or her efforts or influence for the passage or defeat of any proposed law or resolution.

**Section 838.10, or section 2 of chapter 23956, Laws of Florida, acts of 1947,** sets up a penalty for bribery of a candidate for the Legislature. It prohibits anyone from corruptly giving, offering or promising to any candidate or prospective candidate for the Legislature anything of value with intent to influence his act, vote, opinion, decision or judgment on any

matter, question or proceeding which may by law come or be brought before him in his official capacity while a member of the Legislature.

**Section 849.24, or chapter 24345**, Laws of Florida, acts of 1947, regulates book making on the grounds of a permit holder of a horse or dog track or jai alia fronton license and provides a penalty for the violation of the statute.

**Section 855.07, or chapter 23861**, Laws of Florida, acts of 1947, authorizes baseball games on Sunday between 2:00 P. M. and 6:00 P. M.

**Section 947.06 was amended by chapter 23757**, Laws of Florida, acts of 1947, so that a prisoner may now be paroled by a vote of a majority of the members of the Parole Commission. The statute formerly required the unanimous vote of the Parole Commission to place a prisoner on parole.

**Section 952.24, or chapter 24038**, Laws of Florida, acts of 1947, authorizes the Board of Commissioners of State Institutions to make agreements with the Florida Board of Forestry and Parks for the use of state convicts in the prosecution of work of developing, improving and maintaining the state park system. The effect of this enactment has been to materially reduce the difficulty in securing adequate labor and attendant conditions.

**Section 955.25, or chapter 23907**, Laws of Florida, acts of 1947, authorizes the Board of Commissioners of State Institutions to set apart certain of its institutions, training schools or camps to be used as "security units" of the Industrial School for Boys at Marianna, Florida. These "security units" are to be used by the board as a separate institution for youthful male prisoners and for inmates of the Industrial School who are found to be incorrigible or whose presence in the said school may be deemed injurious to its management and discipline.

**Section 956.09, or chapter 23907**, Laws of Florida, acts of 1947, authorizes the Board of Commissioners of State Institutions to set up "security units" in the Industrial School for Girls at Ocala, Florida. These units are for females and are to be used for purposes similar to the security units established by section 955.25 referred to in the preceding paragraph.

## IMPORTANT COURT PROCEEDINGS AND DECISIONS

During the years 1947 and 1948 there were several important court proceedings and decisions of sufficient importance to justify their inclusion in this report, many of which relate to or arise out of statutes enacted at the 1947 session of the Florida Legislature or constitutional amendments adopted at the general election in 1946 or proposed by the 1947 session of the Florida Legislature. These court proceedings and decisions are classified herein according to their general subject matter and points of law involved.

### Alcoholic Beverages.

**State v. Livingston, 159 Fla. 63, 30 So. (2nd) 740.**—This case raised the question as to whether or not an alcoholic beverage license might be issued to a club or association in a dry county, thus permitting the club or association to serve alcoholic beverages to its members pursuant to the provisions of section 561.34, Florida Statutes, 1941. The court held that if the statute is construed to permit the issuance of such a license then the statute violates the provisions of section 1, article XIX of the Florida Constitution and therefore is invalid. This decision in effect held that no such license may be issued.

**Ex Parte Stoddard, 160 Fla. 187, 34 So. (2nd) 92.**—This was a proceeding to test the validity of section 562.02, Florida Statutes, 1941, as amended by section 12 of chapter 23746, Laws of Florida, acts of 1947, which prohibits a licensee under the beverage law to have in his possession, or to permit anyone else to have in their possession, at or in the place of business of such licensee, beverages containing more than one per cent of alcohol by weight and not permitted to be sold by such licensee under his license. The court upheld the validity of the enactment.

### Board of Control.

**Florida State Improvement Commission v. State Board of Education, et al.**—This was a suit in the circuit court of Leon county, for declaratory decree, in which the Improvement Commission asserted that the Board of Control had no right to pledge as security, income from any property other than buildings constructed with the proceeds of the revenue certificates, but that the Improvement Commission had such right. The circuit court held that the Board of Control had a right to pledge income from buildings either constructed or substantially repaired with the proceeds of the revenue certificates as contended by the Board of Control and State Board of Education, and also that the Florida State Improvement Commission did not have the right to pledge income from dormitories which were not constructed with the proceeds of revenue certificates.

### Constitutional Law.

**J. Tom Watson as Attorney General of Florida, etc., v. Larson, etc., 159 Fla. 860, 33 So. (2nd) 155.**—This was a proceeding to test the constitutionality of an appropriation statute (chapter 23616, Laws of Florida, acts of 1947), which gave to the United States of America out of the treasury of the State of Florida, \$2,000,000 to pay for the acquisition of all privately owned and other lands and interests within the Everglades National Park area, and in paying for the costs and expenses required in connection with such acquisition. The Florida Supreme Court held that the said statute was constitutional.

**City of Miami Beach v. Crandon, Fla., 35 So. (2nd) (adv) 285.**—This was a proceeding to test the validity of a legislative requirement that a proposed constitutional amendment, applicable to only one county, be submitted to the electors of that county and approved by them before being submitted to the electors of the state for adoption. It was contended that such submission was in violation of the state constitution, which makes no express provision for such submission, and therefore such submission was without force and effect. The court upheld the right of the Legislature to so submit the proposed constitutional amendment to the electors of said county. Subsequent to this decision the proposed amendment was submitted to the electors of the county in question and was rejected.

### Criminal Law.

**Wade v. Mayo, U. S. , 92 L. Ed. 1246 (Adv. sheet No. 18).**—Donald Wade was convicted of breaking and entering. He obtained a writ of habeas corpus from one of the United States District Judges. On final hearing in the habeas corpus proceeding the district judge held that the conviction was invalid because the trial court had refused to furnish counsel for Wade upon the latter's request; it appearing to the said district judge that Wade was an indigent boy not capable of adequately defending himself. The state appealed the case to the United States Circuit Court of Appeals, which reversed the judgment of the district court. Wade then obtained a writ of certiorari from the United States Supreme Court, which, on June 14, 1948, reversed the judgment of the circuit court of appeals. The effect of the reversal was that under the facts in the case, Wade was



denied his constitutional rights, in that he was an inexperienced youth incapable of adequately representing himself even in a trial which apparently involved no legal questions.

**Locklin v. Pridgeon, 158 Fla. 742, 30 So. (2nd) 102.**—In this case the Florida Supreme Court held that chapter 22761, Laws of Florida, acts of 1945, was unconstitutional. This statute undertook to declare it unlawful for any person to commit any act under color of authority as an officer, agent, or employee, of the United States Government, the State of Florida, or any political subdivision thereof, when such act was not authorized by law, or to intimidate or otherwise by color of authority cause any other person to release information or to allow inspection of records or to extend a privilege not required by law.

**Munn v. State, 158 Fla. 892, 30 So. (2nd) 501.**—Munn was convicted of manslaughter under section 782.12, Florida Statutes, 1941, because he allowed his pack of vicious, powerful and dangerous pit bulldogs to go at large with knowledge of their propensities, with the result that they attacked and killed a woman who came along on foot. The Florida Supreme Court affirmed the conviction.

**State v. Bacom, 159 Fla. 54, 30 So. (2nd) 744.**—In this case the Florida Supreme Court held that a prosecution for manslaughter through the culpable negligent operation of an automobile was not barred by the fact that the defendant had previously been convicted and sentenced under an information charging him with reckless driving and with driving while under the influence of intoxicating liquor, even though all three offenses stemmed from the same occurrence.

**Ray v. State, 159 Fla. 101, 31 So. (2nd) 156.**—In this case, it was held that an honorable discharge from the United States Army is not admissible for the purpose of proving the good character of a defendant, because the recitals of such certificate are hearsay and there is no opportunity for essential cross examination.

**Brill v. State, 159 Fla. 682, 32 So. (2nd) 607.**—After Brill was convicted of a crime, the trial court suspended the imposition of sentence, from day to day and from term to term, during his good behavior. Thereafter, a hearing was held to determine whether he had violated said condition. This hearing resulted in sentence being imposed, and upon appeal, appellant complained that some of the evidence admitted at said hearing had been gained by an illegal search of his home and was therefore improperly admitted. In affirming the case, the Florida Supreme Court pointed out that the evidence in question was not admitted for the purpose of convicting the defendant but was admitted after conviction as information on the question of whether or not the defendant had violated the condition upon which the imposition of sentence was withheld.

**Cornell v. State, 159 Fla. 687, 32 So. (2nd) 610.**—The information in this case charged that the appellant had the care, custody and control of her two and one-half months old grandchild; that, while the grandmother was intoxicated, from the voluntary use of intoxicating beverages, she negligently placed the baby in the bed with herself and covered the body and face of the baby with bed covers, as a result of which the baby suffocated and died. The mother of the baby was charged as an accessory before the fact, both the grandmother and the mother were convicted. Upon appeal, the Florida Supreme Court affirmed the conviction as to the grandmother, but reversed the conviction of the mother upon the ground that the evidence was insufficient as to the mother.

**Joyner v. State, 158 Fla. 806, 30 So. (2nd) 304; Smith v. State, 159 Fla. 288, 34 So. (2nd) 533.**—The Joyner case involved the habitual criminal statutes, sections 775.09-775.11, Florida Statutes, 1941. The Florida Supreme Court held that in order to impose the increased penalties provided for second offenders, the information or indictment must allege, and evi-

dence must show, that the second conviction was for a felony committed after the first conviction; and that, in order to impose the increased penalty provided for fourth offenders, the foregoing allegations and proof must be made and, also, that it is necessary to allege and prove that the third conviction was for a felony committed after the first and second convictions and that the fourth conviction was for a felony committed after the three preceding convictions. In the Smith case, the Florida Supreme Court held that it is not necessary for a person to serve the sentence imposed upon him for the first felony before he can be sentenced as a second offender for a felony committed after he is convicted of the first felony.

**Simmons v. State, Fla. , 36 So. (2nd) 207.**—Section 918.10, Florida Statutes, 1941, as amended in 1945, provides that the judge's charge in a criminal case must include the penalty fixed by law for the offense for which the accused is on trial. The trial judge declined to charge the jury as to the penalty in this case, and, upon appeal, it was urged that this was error. In affirming the case, the Florida Supreme Court construed the statute as being directory and not mandatory, and held that the trial judge was privileged to omit charging the jury as to the penalty which might be imposed.

**McHugh v. State, Fla. , So. (2nd) .**—The defendant drove an automobile into a motor scooter and killed two boys who were riding on the scooter. He was charged with manslaughter for killing one of the boys through culpable negligence, and was acquitted on this charge. The Florida Supreme Court held that this acquittal did not bar his subsequent conviction for killing the other boy by operating a motor vehicle while intoxicated.

## Fish and Game.

**Beck v. Game and Fresh Water Fish Commission, 159 Fla. 1, 33 So. (2nd) 594; Revels, Sheriff, v. DeGoyler, 159 Fla. 898, 33 So. (2nd) 719; Caldwell v. Game and Fresh Water Fish Commission, 159 Fla. 900, 33 So. (2nd) 720.**—These three cases were decided by the Florida Supreme Court and construed chapters 24178 and 24367, Laws of Florida, acts of 1947. (See sections 374.20 and 374.21, Florida Statutes, 1941.) The cases arose from a controversy over the question of jurisdiction to regulate the taking of fish from the waters of Lake Okeechobee and the waters of the St. Johns River between designated terminii. The statutes designated the named waters to be salt waters of the state, as they had been designated and classified for twenty years prior to the adoption of the constitutional amendment creating the Game and Fresh Water Fish Commission and defining its powers. The court held that the adoption of the constitutional amendment had the effect of divesting the Legislature of power to enact any legislation regulating or controlling the taking of fresh water fish from the waters of the state. This decision followed prior decisions wherein it has been held that the powers granted to the commission by the constitutional amendment are broad enough to empower the commission by administrative rule or regulation to repeal any statute which the Legislature might enact dealing with the subject. The decision leaves the question of the jurisdiction of the two state agencies in more confusion and uncertainty than prior to its adjudication. The effect of the opinion is to confer upon each of the agencies power to regulate and control fishing in the same waters, the one with respect to fresh water fish, the other with respect to salt water fish. The methods or means of fishing permitted by one may be prohibited by the other.

**State ex rel Griffin v. State, 158 Fla. 870, 30 So. (2nd) 919.**—The question in this case was whether a rule promulgated by the Game and Fresh Water Fish Commission governed the taking of fresh water fish from the waters of Lake Okeechobee and the St. Johns River, or whether the taking of such fish from said waters was governed by acts of the Legislature declaring said waters to be salt water and authorizing fish to be taken there-

from in the manner specified. The Florida Supreme Court held that said statutes were unconstitutional insofar as they attempted to regulate the taking of fresh water fish from said waters.

### Justices of the Peace.

**Wilson v. Crews, 160 Fla. 169, 34 So. (2nd) 114.**—This proceeding was brought by Crews, as a constable, and as an individual, of one of the justice districts of DeSoto county, which had been abolished by chapter 23249, Laws of Florida, acts of 1945. The question raised was whether or not the Legislature, under section 21, article V of the state constitution, as amended, had authority to abolish justice districts and the office of justice of the peace and constable in such district, so that there existed in said county no justice of the peace districts, justices or constables. The court held that chapter 23249 was a valid enactment under the constitution, as amended, and upheld the power of the Legislature to abolish any or all justice districts in any county.

### Legislation.

**State v. Bledsoe, 159 Fla. 243, 31 So. (2nd) 457.**—The Florida Legislature enacted and sent to the governor house bill 122. After the said bill reached the governor's office the House of Representatives, apparently without the concurrence of the Senate, requested the return of said bill to the House of Representatives and acted upon it so as to leave it pending upon the docket at the time of adjournment. The question that was raised is: May one house of Legislature recall a bill from the governor's office? The Florida Supreme Court held that no such power existed and that the bill became a law notwithstanding the action of the House of Representatives in recalling the bill. The officers of the House of Representatives were directed by the Florida Supreme Court to deliver the said bill to the secretary of state.

**Advisory Opinion to the Governor, 158 Fla. 872, 30 So. (2nd) 377.**—This case raises a question as to the power of the Florida Legislature to provide six dollars per day to each member of the Florida Legislature for "purchase of postage stamps and for other necessary and incidental expenses, not now supplied by the legislature." The question was whether or not this was additional pay to the members of the Legislature in violation of section 4, article III, of the state constitution. The Florida Supreme Court held that such expense money did not violate said provision of the constitution, and that payment was authorized.

### Offices.

**State v. Gay, 158 Fla. 465, 28 So. (2nd) 901.**—This was a proceeding by the state, on the relation of Edwin G. Fraser, for a writ of quo warranto to determine his claim to the office of state comptroller as against the incumbent, Clarence M. Gay. Fraser was a member of the Senate of the 1945 session of the Florida Legislature. His term did not expire until the 1948 general election. The salary of the office of state comptroller was increased by the 1945 Legislature. The question presented to the court was whether or not Fraser, who had apparently been elected state comptroller at the general election in 1946, was disqualified so that he could not legally assume the office of state comptroller. The court held that under the facts stated, Fraser was disqualified under section 5, article III, of the Florida Constitution.

### Patents.

**Suni-Citrus Products Company v. Vincent, et al.**—In an effort to end the litigation in the patent office between the state, as owner of the Neal patent application for processing citrus waste products, and Daniel Vincent

and other patentees holding patents or patent applications covering similar processes, the state entered into an agreement with Vincent in which the other patentees were invited to join. This agreement was designed to put all of these apparently conflicting patents and patent claims in the hands of a single trustee; for the purpose of licensing manufacturers under any and all of the patents involved, and giving to the manufacturer right to use any of them without fear of infringement. Suni-Citrus Products Company brought suit in the federal district court in Tampa to cancel the agreement on the ground that it violated the Sherman Act, the Clayton Act, and the Purnell Act. The case was tried and the Suni-Citrus Products Company bill was dismissed. Suni-Citrus Products Company appealed, and the case is now pending in the fifth circuit court of appeals.

#### Payment of Costs in Civil Cases.

**Wingate v. Kapp, Fla. , 36 So. (2nd) (adv) 170.**—This was a certificate from one of the circuit judges for the purpose of determining the payment of jury costs in a proceeding tried after the regular term of court for the trial of cases but before the minutes of the court had been finally approved and signed by the court. The main question was whether or not the court was in vacation within the contemplation of section 40.25, Florida Statutes, 1941, so that such costs might be assessed against the parties. The court held that the circuit court in question was not in vacation but in term and that such costs should be paid by the state under said section 40.25.

#### Public Lands.

**Watson v. Caldwell, Fla. , 35 So. (2nd) (adv) 125.**—This was a proceeding to test the right of the State Board of Education to convey school lands to the Trustees of the Internal Improvement Fund. The purpose of conveyance was so that the lands could be conveyed by the Trustees to the federal government for park purposes. The right of the Trustees to convey public lands to the federal government for park purposes was also questioned in this proceeding. The court held that such conveyances were legal.

**Wilson Cypress Company v. Trustees of the I. I. Fund.**—This was a suit in equity in the Circuit Court of Volusia County, the outgrowth of a common law action brought several years ago by the Trustees of the Internal Improvement Fund against Wilson Cypress Company of Putnam county. The questions involved were: (1) the boundaries of the Fitch Grant in Township 17 South, Range 29 East (Spanish Grant of 1817); (2) the boundaries of certain government lots in Township 16 South, Range 29 East, and (3) Wilson Cypress Company's asserted preferential right to purchase certain other timberland. With reference to the Fitch Grant, the question was whether the west boundary was the St. Johns River or the edge of a swamp about a mile or two miles east of the St. Johns River. Wilson Cypress Company had cut the timber on this disputed territory. Testimony was very voluminous, including several hundred old grants, surveys, field notes, and other documents. The Township 16 issue was whether a government lot extended to a marsh and creek, as contended by Wilson Cypress Company. On strongly conflicting testimony both of these issues were decided in favor of Wilson Cypress Company. On the other hand, the land which Wilson Cypress Company claimed preferential right to purchase and which had been sold by the state for approximately \$100,000, was held by the court to be free of any such claim by Wilson Cypress Company, and title of the Trustees of the Internal Improvement Fund was confirmed.



### Retirement of State Employees.

**State v. Smith, Fla. , 35 So. (2nd) (adv) 650.**—In this case the Florida Industrial Commission, by resolution, set up a compulsory retirement system requiring its employees to retire at the age of sixty-five unless the employee be granted permission to retire at an older age, but requiring all employees to retire on or before the age of seventy. No retirement system adopted by the Legislature contains any compulsory retirement provision as was contained in the said resolution. The court held that the resolution was void and that the commission was without power or authority to adopt it.

### Right-to-Work Amendment and Labor Laws.

**American Federation of Labor v. J. Tom Watson as Attorney General, etc., 159 Fla. 333, 31 So. (2nd) 394.**—In this case the American Federation of Labor sought a declaratory decree of the Circuit Court of Hillsborough County, Florida. The court was asked to declare the right-to-work guarantee in section 12 of the Declaration of Rights of the state constitution void and in violation of the federal constitution. The circuit court dismissed the cause for misjoinder of parties and causes of action. The Florida Supreme Court affirmed the order of dismissal.

### Schools and School Code.

**Scott v. Board of Public Instruction of Alachua County, Fla. , 35 So. (2nd) (adv) 579.**—In this case it was held that one county might purchase real property in another county and use it for educational purposes when such property is necessary to carry out a proper educational program of such county.

**Fletcher v. Board of Public Instruction of Gadsden County, Fla. , 35 So. (2nd) 121.**—In this case the Florida Supreme Court held that bonds issued by a special tax school district, which district was later consolidated into one county-wide district, could be lawfully delivered to the purchaser after the consolidation.

**Bragg v. Board of Public Instruction of Duval County, Fla. , 36 So. (2nd) 222.**—The Florida Supreme Court again held that a county Board of Public Instruction is immune from tort action. In this case a school student was injured while operating a machine in the performance of a required part of the school curriculum.

**Brevard County v. Board of Public Instruction of Brevard County, 159 Fla. 869, 33 So. (2nd) 54.**—In this case the Florida Supreme Court held that the school code, chapter 19355, Laws of 1939, which included numerous provisions relating to school districts, repealed the special act of 1935 authorizing the creation of tax school district 5 in Brevard county.

**Advisory Opinion to the Governor, 159 Fla. 464, 31 So. (2nd) 854.**—The 1947 session of the Legislature amended the school code so as to provide a five-member school board in all counties. At that time a majority of the counties had three-member boards. The question arose as to whether or not the requirement for a five-member board became immediately effective; and whether or not there existed a vacancy in the previously existing three-member boards that should be filled by the governor. The Florida Supreme Court held that there was such a vacancy and that two additional members in each county previously having a three-member board should be appointed by the governor.

**Weiss v. Leonardy, Fla. , 36 So. (2nd) (adv) 184.**—This was an appeal from a declaratory decree brought by school teachers in Dade county, to secure a construction of chapter 23726, Laws of Florida, acts of 1947, insofar as chapter 23726 relates to the payment of teachers' salaries.

Under the said act it appears that teachers' salaries are payable in twelve equal instalments. The question before the court was whether or not the twelve payments should be made commencing with the beginning of the fiscal year the first year of a school teacher's employment, or with the beginning of the school term for which a teacher is employed. The court held that "they should be paid in equal monthly instalments from the date of their employment to the end of the fiscal year." The court seems to have assumed that employment begins with the beginning of the fiscal year unless made subsequent thereto.

### **Taxation.**

**Local Union No. 696, etc., v. Sparkman, etc. (Circuit Court of Hillsborough County, Florida).**—This suit involved the constitutionality of chapter 23729, Laws of Florida, acts of 1947, which was a special act, seeking to exempt the property of a labor union in Tampa from existing delinquent and future ad valorem taxes. The circuit court held the act unconstitutional. There was no appeal from the decree of the circuit court.

## STATE LAW DEPARTMENT ATTORNEY GENERAL J. TOM WATSON

### ASSISTANT ATTORNEYS GENERAL

FRED M. BURNS .....	August, 1939
JAMES B. TONEY .....	January, 1941
HOWARD S. BAILEY .....	March, 1944
FRANK J. HEINTZ .....	April, 1944
REEVES BOWEN .....	January, 1945
SUMTER LEITNER .....	February, 1945
BOLLING C. STANLEY .....	April, 1945
T. PAINE KELLY .....	July, 1945
JESSE F. WARREN, JR. ....	October, 1946
REBECCA B. MARKS (MRS.) ..	October, 1946
<sup>1</sup> THOMAS V. KIERNAN .....	January, 1941-June, 1947
D. FRED McMULLEN .....	May, 1944-December, 1947
J. LUTHER DREW .....	December, 1947-September, 1948
<sup>2</sup> ERNEST W. WELCH .....	September, 1941-August, 1948

### SPECIAL ASSISTANT ATTORNEYS GENERAL

VIRGINIA C. SEARCY (MRS.) ..	June, 1945
LUCILLE J. SNOWDEN (MISS) ..	November, 1947
GEORGE OWEN .....	November, 1948
<sup>3</sup> JOHN K. BALLINGER .....	April, 1941-February, 1948

### ASST. EDITOR BIENNIAL REPORT

ROSELYN SPEAR .....	June, 1947
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<sup>1</sup> On military leave from February, 1942 to March, 1946.

<sup>2</sup> On military leave from February, 1942 to May, 1946.

<sup>3</sup> On military leave from June, 1942 to January, 1946.

## LIBRARIAN AND ASSISTANT REPORTER

T. L. KARN ..... February, 1941

## SECRETARIES

LILLIAN H. WALKER ..... May, 1944  
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 BEATRIX M. JAMES ..... February, 1947  
 JEWELL R. ROEMER ..... February, 1947  
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 ELLEN G. LLOYD ..... August, 1947  
 LILLIAN S. RYDER ..... December, 1947  
 LILLIE O. HALL ..... December, 1947  
 AUDREY W. CLARK ..... January, 1948  
 VIRGINIA R. SMITH ..... October, 1948  
 MARY VALLANCE ..... November, 1942-November, 1947  
 IRENE A. SMITH ..... April, 1943-April, 1947  
 JEWELL R. GARMAN ..... January, 1944-May, 1947  
 DORIS DALLAS ..... June, 1945-July, 1947  
 CATHERINE F. TURNBULL ..... January, 1946-December, 1947  
 LUCILLE REEDER ..... April, 1946-February, 1947  
 ROSE ANN NIMITZ ..... October, 1946-October, 1947  
 LOUELLA TAYLOR ..... October, 1946-September, 1947  
 FLOSSIE H. LOTT ..... December, 1946-January, 1947  
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 PATRICIA D. ANDERSON ..... October, 1946-June, 1948  
 MARY E. WOOD ..... April, 1948-June, 1948  
 MARY L. McDONALD ..... August, 1944-November, 1948

## STENOGRAPHERS-CLERKS

LOIS DANIELS ..... July, 1946  
 PEGGY SUE RUSS ..... September, 1947  
 GEORGIA K. BARBER ..... February, 1945-February, 1948  
 RITA A. WALKER ..... April, 1947-August, 1947  
 GLORIA L. SCARBOROUGH ..... September, 1947-December, 1947

## RECEPTIONISTS AND TELEPHONE OPERATORS

LIDIE M. MOSS ..... April, 1948  
 INEZ A. REDDING ..... May, 1944-May, 1948

## FILING SECRETARIES

MARTHA G. SMITH ..... September, 1946  
 MARGUERITE E. KEEGAN ..... October, 1947  
 MARGARET E. GANNON ..... April, 1929-July, 1947

## STUDENTS—PART TIME

NANCY REARDEN ..... September, 1946



# JUDICIAL DEPARTMENT OF FLORIDA

## Supreme Court Justices

TALLAHASSEE, FLORIDA

### 1947-1948 TERMS

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Hon. ELWYN THOMAS

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Hon. GLENN TERRELL

Hon. R. H. CHAPMAN

Hon. H. L. SEBRING

#### DIVISION B

Hon. RIVERS BUFORD\*

Hon. ALTO ADAMS

Hon. PAUL D. BARNES

\*Mr. Justice Buford resigned April 3, 1948 and Hon. J. Frank Hobson was commissioned April 6, 1948.

### 1949-1950 TERMS

Chief Justice

Hon. ALTO ADAMS

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Hon. ELWYN THOMAS

Hon. PAUL D. BARNES

#### DIVISION B

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Hon. H. L. SEBRING

Hon. T. FRANK HOBSON

Hon. GUYTE P. McCORD, Clerk Supreme Court.

Hon. J. TOM WATSON, Attorney General.

Hon. LEWIS W. PETTEWAY, Attorney for State Railroad Commission.

Hon. WILLIAM A. O'BRYAN, Attorney for State Road Department.

### JUDGES OF THE CIRCUIT COURTS

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	Hon. L. L. FABISINSKI, Pensacola
	Hon. D. STUART GILLIS, DeFuniak Springs
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	Hon. A. D. McNEIL, Jacksonville
	Hon. CLAUD OGILVIE, Jacksonville
	Hon. BRYAN SIMPSON, Jacksonville
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Fifth Circuit.....	Hon. TRUMAN G. FUTCH, <sup>1</sup> Leesburg Hon. F. R. HOCKER, Ocala Hon. J. C. B. KOONCE, <sup>2</sup> Tavares
Sixth Circuit.....	Hon. JOHN U. BIRD, Clearwater Hon. T. FRANK HOBSON, <sup>3</sup> St. Petersburg Hon. JOHN DICKINSON, <sup>4</sup> Clearwater Hon. VICTOR O. WEHLE, St. Petersburg
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Fourteenth Circuit.....	Hon. IRA A. HUTCHINSON, <sup>7</sup> Panama City Hon. E. CLAY LEWIS, JR., <sup>8</sup> Hon. E. C. WELCH, Marianna
Fifteenth Circuit.....	Hon. C. E. CHILLINGWORTH, West Palm Beach Hon. GEO. W. TEDDER, Ft. Lauderdale Hon. JOSEPH S. WHITE, West Palm Beach

<sup>1</sup> Commissioned September 23, 1948<sup>2</sup> Died September 15, 1948<sup>3</sup> Resigned April 5, 1948<sup>4</sup> Commissioned July 5, 1948<sup>5</sup> Retired July 11, 1947<sup>6</sup> Commissioned July 11, 1947<sup>7</sup> Retired November 1, 1948<sup>8</sup> Commissioned November 1, 1948

## JUDGES OF COURTS OF RECORD

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Pasco County.....	Hon. W. KENNETH BARNES, Dade City

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Polk County.....	Hon. ROY H. AMIDON, Bartow

## JUDGE OF COURT OF CRIMES

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	Hon. NORMAN HENDRY, Miami
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Pinellas County.....	Hon. LINCOLN C. BOGUE, <sup>1</sup> St. Petersburg
	Hon. ALFRED P. MARSHALL, <sup>2</sup> Clearwater
	Hon. G. BOWDON HUNT, Bartow

<sup>1</sup> Resigned effective June 18, 1947<sup>2</sup> Commissioned June 19, 1947

## COUNTY JUDGES

Alachua County.....	Hon. H. H. McDONALD, Gainesville
Baker County.....	Hon. W. M. BROWN, Macclenny
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Brevard County.....	Hon. VASSAR B. CARLTON, Titusville
Broward County.....	Hon. BOYD H. ANDERSON, Ft. Lauderdale
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Levy County.....	Hon. H. S. WILSON, Bronson
Liberty County.....	Hon. R. H. DEASON, Bristol
Madison County.....	Hon. J. R. KELLEY <sup>1</sup>
Madison County.....	Hon. CURTIS D. EARP, <sup>2</sup> Madison
Manatee County.....	Hon. S. J. MURPHY, Bradenton
Marion County.....	Hon. D. R. SMITH, Ocala
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Nassau County.....	Hon. H. V. BURGESS, Fernandina
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St. Lucie County.....	Hon. FLEM C. DAME, Ft. Pierce
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Volusia County.....	Hon. J. E. PEACOCK, DeLand
Wakulla County.....	Hon. A. L. PORTER, Crawfordville
Walton County.....	Hon. EDWIN B. DRAKE, DeFuniak Springs
Washington Co.....	Hon. SAM D. MAY, Chipley

<sup>1</sup> Died May 19, 1947<sup>2</sup> Commissioned May 26, 1947

## STATE ATTORNEYS

First Circuit.....	Hon. J. EDWIN HOLSBERRY, Pensacola
Second Circuit.....	Hon. WILLIAM D. HOPKINS, <sup>1</sup> Tallahassee
Third Circuit.....	Hon. A. K. BLACK, Lake City
Fourth Circuit.....	Hon. WILLIAM A. HALLOWES, III, Jacksonville
Fifth Circuit.....	Hon. J. W. HUNTER, Tavares
Sixth Circuit.....	Hon. CHESTER B. McMULLEN, Clearwater
Seventh Circuit.....	Hon. MURRAY SAMS, DeLand
Eighth Circuit.....	Hon. T. E. DUNCAN, Gainesville

<sup>1</sup> Commissioned April 29, 1947



Ninth Circuit.....	Hon. MURRAY W. OVERSTREET, Kissimmee
Tenth Circuit.....	Hon. L. GRADY BURTON, Wauchula
Eleventh Circuit.....	Hon. GLENN C. MINCER, Miami
Twelfth Circuit.....	Hon. CLYDE H. WILSON, <sup>2</sup> Sarasota
Twelfth Circuit.....	Hon. WM. M. SMILEY, <sup>3</sup> Bradenton
Thirteenth Circuit.....	Hon. J. REX FARRIOR, Tampa
Fourteenth Circuit.....	Hon. L. D. McRAE, Chipley
Fifteenth Circuit.....	Hon. PHIL O'CONNELL, W. Palm Beach

<sup>2</sup> Resigned July 30, 1947<sup>3</sup> Commissioned May 1, 1947

## ASSISTANT STATE ATTORNEYS

First Circuit.....	None
Second Circuit.....	Hon. C. H. BOURKE FLOYD, <sup>1</sup> Apalachicola
Third Circuit.....	Hon. O. O. EDWARDS, Cross City
Fourth Circuit.....	Hon. NATHAN SCHEVITZ, Jacksonville Hon. THOS. J. SHAVE, JR., Fernandina
Fifth Circuit.....	Hon. A. P. BUIE, Ocala
Sixth Circuit.....	Hon. DON GEIGER, <sup>2</sup> Dade City Hon. W. H. BREWTON, <sup>3</sup> Dade City
Seventh Circuit.....	Hon. JULIAN C. CALHOUN, Palatka
Eighth Circuit.....	Hon. JOE HILL WILLIAMS, Lake Butler
Ninth Circuit.....	Hon. THAD H. CARLTON, Ft. Pierce Hon. GEORGE A. DECOTTES, Sanford
Tenth Circuit.....	Hon. WALTER WOOLFOLK, Lake Wales
Eleventh Circuit.....	Hon. S. O. CARSON, <sup>4</sup> Miami Hon. JOHN W. PRUNTY, <sup>5</sup> Miami Hon. W. CURRY HARRIS, <sup>6</sup> Key West Hon. WM. V. ALBURY, <sup>7</sup> Key West
Twelfth Circuit.....	Hon. E. M. MAGAHA, Fort Myers Hon. L. J. ROBBINS, <sup>8</sup> Arcadia Hon. W. M. SMILEY, <sup>9</sup> Bradenton
Thirteenth Circuit.....	Hon. FRED TUPPER SAUSSY, JR., <sup>10</sup> Tampa Hon. J. FRANK UMSTOT, <sup>11</sup> Tampa
Fourteenth Circuit.....	Hon. E. CLAY LEWIS, JR., <sup>12</sup> Port St. Joe
Fifteenth Circuit.....	Hon. DWIGHT L. ROGERS, JR., <sup>13</sup> Ft. Lauderdale Hon. LOUIS F. MAIRE, <sup>14</sup> Ft. Lauderdale

<sup>1</sup> Commissioned November 9, 1948<sup>2</sup> Commissioned June 21, 1947<sup>3</sup> Term expired<sup>4</sup> Resigned November 30, 1947<sup>5</sup> Commissioned December 5, 1947<sup>6</sup> Commissioned June 12, 1947<sup>7</sup> Term expired<sup>8</sup> Commissioned June 19, 1947<sup>9</sup> Appointed State Attorney May 1, 1947<sup>10</sup> Commissioned June 21, 1947<sup>11</sup> Term expired<sup>12</sup> Resigned October 7, 1948<sup>13</sup> Commissioned May 15, 1947<sup>14</sup> Resigned April 30, 1947

## COUNTY SOLICITORS

Dade County.....	Hon. ROBERT R. TAYLOR, Miami
Duval County.....	Hon. WAYNE E. RIPLEY, Jacksonville
Escambia County.....	Hon. FORSYTH CARO, Pensacola
Hillsborough Co.....	Hon. LUTHER W. COBBEY, <sup>1</sup> Tampa Hon. V. R. FISHER, <sup>2</sup> Tampa
Monroe County.....	Hon. ALLAN B. CLEARE, JR., Key West

<sup>1</sup> Died July 19, 1947<sup>2</sup> Commissioned August 6, 1947

Orange County.....	Hon. O. RAYMOND ELLARS, Orlando
Palm Beach County.....	Hon. W. E. ROEBUCK, West Palm Beach
Pasco County.....	Hon. T. H. GETZEN, Dade City
Polk County.....	Hon. GUNTER STEPHENSON, Bartow

## COUNTY PROSECUTING ATTORNEYS

Broward County.....	Hon. W. GERRY MILLER, Ft. Lauderdale
DeSoto County.....	Hon. M. A. ROSIN, Arcadia
Gadsden County.....	Hon. WILLIAM D. DOSS, Quincy
Indian River Co.....	Hon. SHERMAN N. SMITH, JR., Vero Beach
Jefferson County.....	Hon. JOHN H. SHUMAN, Monticello
Lee County.....	Hon. JOHN K. WOOLSLAIR, Ft. Myers
Leon County.....	Hon. WILLIAM D. HOPKINS, <sup>1</sup> Tallahassee Hon. GUYTE P. McCORD, JR., <sup>2</sup> Tallahassee
Madison County.....	Hon. COLUMBUS B. SMITH, Madison
Manatee County.....	Hon. GEO. R. HITCHCOLK, Bradenton
Martin County.....	Hon. T. T. OUGHTERSON, Stuart
Okeechobee Co.....	Hon. MARY SANDEFUR SCHULMAN, Okeechobee
Osceola County.....	Hon. JAY JOHNSTON, St. Cloud
Pinellas County.....	Hon. JOHN DICKINSON, <sup>3</sup> Clearwater Hon. LLOYD M. PHILLIPS, <sup>4</sup> St. Petersburg
St. Lucie County.....	Hon. A. C. SIMMONS, Fort Pierce
Sarasota County.....	Hon. LAMAR B. DOZIER, Sarasota
Seminole County.....	Hon. GEORGE A. SPEER, JR., Sanford
Sumter County.....	Hon. JAMES W. WEST, Bushnell

<sup>1</sup> Resigned July 30, 1947<sup>2</sup> Commissioned August 1, 1947<sup>3</sup> Resigned June 30, 1948<sup>4</sup> Commissioned July 1, 1948

## ASSISTANT COUNTY SOLICITORS

Dade County.....	Hon. EMMETT W. KEHOE, Miami Hon. JOHN H. BOYER, Miami Hon. J. B. FLAHERTY, Miami Hon. MICHAEL F. ZAROWNY, Miami Hon. WALLACE N. MAER, Miami
Duval County.....	Hon. WILLIAM T. HARVEY, Jacksonville Hon. O. R. T. BOWDEN, Jacksonville Hon. JULIAN WARREN, Jacksonville
Escambia County.....	Hon. SAM HALL, Pensacola Hon. KIRKE M. BEALL, Pensacola
Hillsborough Co.....	Hon. JOHN B. MINARDI, Tampa Hon. WILLIAM H. FRECKER, Tampa Hon. JAMES M. McEWEN, Tampa
Monroe County.....	None
Orange County.....	Hon. FRANCIS P. MARION, Orlando
Palm Beach County.....	Hon. PASCHAL C. REESE, West Palm Beach
Pasco County.....	None
Polk County.....	Hon. WILLIAM K. LOVE, Bartow Hon. WILLIAM P. TOMASELLO, Bartow

## REPORT OF CLERKS OF CIRCUIT COURTS

County	Circuit	Name Of Clerk	Common Law Cases Undisposed Of	Chancery Cases Undisposed of	Common Law Cases Filed	Chancery Cases Filed	Common Law Cases Disposed Of	Chancery Cases Disposed Of	All Other Cases Disposed Of
Alachua .....	8th	George E. Evans ....	156	206	114	430	43	309	170
Bradford .....	8th	A. J. Thomas .....	90	331	101	1668	51	1520	21
Brevard .....	9th	G. M. Simmons .....	61	232	108	1298	47	1066	19
Broward .....	15th	Ted Cabot .....	789	1177	619	1815	318	1590	--
Calhoun .....	14th	J. A. Peacock .....	23	118	24	139	16	115	9
Charlotte .....	12th	E. H. Scott .....	11	23	15	138	4	115	--
Clay .....	4th	R. L. Tilley .....	21	124	23	423	21	493	9
Collier .....	12th	Edmund F. Scott .....	4	22	9	32	5	12	--
Columbia .....	3rd	Hugh B. Summers ..	42	168	76	263	49	241	--
Dade .....	11th	E. B. Leatherman ..	799	2832	988	7577	189	4745	289
DeSoto .....	12th	Leslie E. Avant .....	2	27	23	103	13	89	20
Dixie .....	3rd	Cauley C. Copeland ..	4	24	8	108	4	84	--
Duval .....	4th	Leonard W. Thomas ..	--	--	1040	5688	768	4049	1026
Escambia .....	1st	Langley Bell .....	240	684	190	550	221	391	10
Flagler .....	7th	Ralph E. Harbert .....	5	48	11	184	9	110	--
Franklin .....	2nd	W. P. Dodd .....	9	14	26	69	17	55	6
Gadsden .....	2nd	F. F. Morgan .....	13	43	26	102	14	59	6
Gilchrist .....	8th	R. E. Davis .....	4	5	5	4	1	4	3
Glades .....	12th	Mrs. D. S. Weeks ..	8	6	14	49	6	43	13
Gulf .....	14th	George Y. Core .....	3	25	34	106	34	82	--
Hamilton .....	3rd	Thelma Lewis .....	6	24	9	55	3	31	--
Hardee .....	10th	Ben Coker .....	31	114	41	637	10	523	--
Highlands .....	10th	H. T. Piety .....	44	77	101	347	57	270	10
Hillsborough .....	13th	Chas. H. Pent .....	120	951	901	4964	279	4960	--
Indian River .....	9th	Douglas Baker .....	156	166	34	188	18	146	24
Jackson .....	14th	Doc Grant .....	91	355	79	436	48	348	39
Jefferson .....	2nd	Clyde H. Sauls .....	6	8	12	27	11	25	--
Lake .....	5th	George J. Dykes .....	1447	1151	183	722	90	776	--
Lee .....	12th	D. T. Farabee .....	27	73	66	428	46	380	51
Leon .....	2nd	Geo. G. Crawford ..	167	272	433	966	266	694	--
Madison .....	3rd	D. F. Burnett .....	8	25	12	55	3	30	2

Manatee .....	12th	Lloyd M. Hicks .....	58	461	91	744	36	258	40
Martin .....	9th	J. R. Pomeroy .....	14	55	43	159	29	103	
Monroe .....	11th	Ross C. Sawyer .....	38	195	55	874	17	679	45
Nassau .....	4th	T. W. Brown .....	22	57	39	108	17	87	67
Okaloosa .....	1st	Leron W. Rice .....	23	168	68	498	51	573	39
Okeechobee ..	9th	Mabel R. Sheffield..	4	19	2	47	0	39	21
Orange .....	9th	Arthur W. Newell ..	222	486	429	1266	355	1345	61
Palm Beach ..	15th	J. Alex Arnette .....	415	821	844	2605	490	2433	
Pasco .....	6th	A. J. Burnside .....	9	99	20	474	11	375	
Pinellas .....	6th	Ray E. Green .....	360	1093	501	2976	330	3180	86
Polk .....	10th	D. H. Sloan, Jr. ....	194	660	406	2876	212	2216	46
Putnam .....	7th	Mrs. W. A. Wil-							
		liams, Jr. ....	69	92	120	408	58	338	
St. Johns .....	7th	Hiram Faver .....	36	135	51	1058	42	973	
St. Lucie .....	9th	W. R. Lott .....	74	145	127	452	53	307	
Sarasota .....	12th	W. A. Wynne .....	51	131	76	316	25	186	
Seminole .....	9th	O. P. Herndon .....	47	162	68	614	21	452	
Taylor .....	3rd	F. A. Parker .....	11	52	19	150	8	98	106
Union .....	8th	C. B. Hayes .....	14	30	15	52	15	50	4
Volusia .....	7th	Jess Mathas .....	432	589	810	2465	378	1876	
Walton .....	1st	Kate Gillis .....	21	80	26	246	5	166	1



**REPORT OF CLERK OF CIVIL COURT OF  
RECORD, CRIMINAL COURT OF RECORD  
AND THE COURT OF CRIMES  
DADE COUNTY**

Number of cases filed during the biennium of 1947-1948 .....	17946
Number of cases closed during the biennium of 1947-1948 .....	13753

Respectfully submitted,

W. CECIL WATSON, Clerk

**REPORT OF CLERK OF CIVIL COURT OF  
RECORD DUVAL COUNTY**

Number of common law cases undisposed of for the biennium of 1947-1948 .....	2,555
Number of common law cases disposed of during the biennium of 1947-1948 .....	852

Respectfully submitted,

K. L. HARTLEY, Clerk

## REPORT OF CLERK OF COURT OF RECORD ESCAMBIA COUNTY

Number of common law cases undisposed of January 1, 1949 .....	144
Number of Chancery cases undisposed of January 1, 1949 .....	450
Number of common law cases filed during the biennium of 1947-1948 .....	351
Number of chancery cases filed during the biennium of 1947-1948 .....	1,372
Number of common law cases disposed of during the biennium of 1947-1948 .....	232
Number of chancery cases disposed of during the biennium of 1947-1948 .....	1,130
Number of all other cases disposed of during the biennium of 1947-1948 .....	42

Respectfully submitted,

GEORGE TRAWICK, Clerk

## REPORT OF CLERK OF STATUTORY COURT OF RECORD PASCO COUNTY

Number of cases disposed of during the biennium of 1947-1948 .....	21
Number of cases undisposed of for the biennium of 1947-1948 .....	24

Respectfully submitted,

A. J. BURNSIDE, Clerk



# REPORTS OF STATE ATTORNEYS FOR YEARS 1947-1948, INCLUSIVE, UNDER SECTION 16.09, FLORIDA STATUTES, 1941

## FIRST JUDICIAL CIRCUIT

Escambia County  
Okaloosa County

Santa Rosa County  
Walton County

### ESCAMBIA:

(No report submitted in time for publication.)

### OKALOOSA:

(No report submitted in time for publication.)

### SANTA ROSA:

(No report submitted in time for publication.)

### WALTON:

(No report submitted in time for publication.)

## SECOND JUDICIAL CIRCUIT

Franklin County  
Gadsden County  
Jefferson County

Leon County  
Liberty County  
Wakulla County

### FRANKLIN:

	(A)	(B)	(C)	(D)	(E)
Arson .....	2	—	—	2	—
Assault with intent to commit a felony.....	2	—	—	1	1
Breaking and entering .....	15	—	2	12	1
Embezzlement .....	2	—	—	2	—
Larceny .....	5	—	1	4	—
Lewd, lascivious and indecent assault .....	1	—	—	—	1
Nonsupport or desertion .....	7	—	2	5	—
Resisting an officer .....	1	—	—	1	—
Robbery .....	1	—	—	1	—
Worthless checks and drafts .....	1	—	—	1	—

### OTHER CASES HANDLED

Appeals from lower court to circuit court.....	1	—	—	—	—
Bond estreature proceedings .....	1	—	—	—	—
Criminal hearings attended .....	10	—	—	—	—
Habeas corpus hearings attended .....	4	—	—	—	—

(A) Indictments and Informations.

(B) No True Bills and No Informations.

(C) Nolle Prosequi.

(D) Convictions.

(E) Acquittals.



GADSDEN:	(A)	(B)	(C)	(D)	(E)
Adultery .....	4	1	1	2	—
Aggravated assault .....	2	—	—	2	—
Arson .....	1	—	—	1	—
Assault with intent to commit a felony.....	6	—	2	4	—
Breaking and entering .....	41	—	4	35	2
False pretense .....	1	—	1	—	—
Forgery .....	2	—	—	2	—
Homicide:					
Murder, first degree .....	1	—	—	—	1
Murder, second degree .....	4	—	1	3	—
Manslaughter .....	2	—	—	1	1
Larceny .....	9	—	—	6	3
Nonsupport or desertion .....	10	—	4	6	—
Rape .....	2	—	—	2	—
Receiving stolen property .....	1	—	—	1	—
Robbery .....	1	—	1	—	—
Worthless checks and drafts .....	1	—	1	—	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	3	—	—	—	—
Bond validation proceedings .....	2	—	—	—	—
Criminal hearings attended .....	25	—	—	—	—
Habeas corpus hearings attended .....	2	—	—	—	—
Other cases not enumerated .....	8	—	3	5	—

JEFFERSON:	(A)	(B)	(C)	(D)	(E)
Accessory to murder .....	1	—	—	—	1
Adultery .....	1	—	—	—	1
Aggravated assault .....	1	—	—	1	—
Assault with intent to commit a felony .....	12	—	1	9	2
Breaking and entering .....	8	—	1	7	—
Crime against nature .....	1	—	—	1	—
Homicide:					
Murder, second degree .....	4	—	—	2	2
Manslaughter .....	1	—	1	—	—
Larceny .....	11	—	2	8	1
Lewd, lascivious and indecent assault .....	2	—	—	—	2
Nonsupport or desertion .....	2	—	1	1	—
Resisting an officer .....	2	—	—	2	—
Worthless checks and drafts .....	4	—	4	—	—

## OTHER CASES HANDLED

Criminal hearings attended .....	10	—	—	—	—
----------------------------------	----	---	---	---	---

LIBERTY:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony .....	1	—	1	—	—
Breaking and entering .....	2	—	—	1	1
Homicide:					
Murder, first degree .....	1	—	—	1	—
Nonsupport or desertion .....	1	—	—	—	1
Resisting an officer .....	1	—	—	—	1

## OTHER CASES HANDLED

Criminal hearings attended .....	8	—	—	—	—
Other cases not enumerated .....	3	—	—	3	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

LEON:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	6	—	—	6	—
Arson .....	2	—	—	—	2
Assault with intent to commit a felony .....	12	—	—	12	—
Attempt to commit a felony .....	1	—	—	1	—
Breaking and entering .....	61	—	7	51	3
Crime against nature .....	1	—	—	1	—
Embezzlement .....	2	—	—	2	—
Entering without breaking .....	6	—	—	6	—
False pretense .....	2	—	—	2	—
Forgery .....	27	—	4	22	1
Hit and run .....	3	—	—	3	—
Homicide:					
Murder, first degree .....	4	—	—	3	1
Murder, second degree .....	6	—	1	1	4
Manslaughter .....	9	—	2	6	1
Killing animal of another .....	4	—	—	4	—
Larceny .....	51	—	8	40	3
Lewd, lascivious and indecent assault .....	1	—	—	1	—
Nonsupport or desertion .....	10	—	1	9	—
Rape .....	1	—	—	—	1
Receiving stolen property .....	5	—	—	5	—
Resisting an officer .....	1	—	—	1	—
Robbery .....	8	—	1	7	—
Unlawful practice of medicine .....	1	—	—	1	—
Worthless checks and drafts .....	6	—	2	4	—

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	2	—	—	—	—
Bond estreatment proceedings .....	2	—	—	—	—
Bond validation proceedings .....	4	—	—	—	—
Criminal hearings attended .....	175	—	—	—	—
Habeas corpus hearings attended .....	5	—	—	—	—
Other cases not enumerated .....	34	—	7	25	2

WAKULLA:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	2	—	—	1	1
Assault with intent to commit a felony .....	2	—	1	1	—
Attempt to commit a felony .....	1	—	—	—	1
Breaking and entering .....	3	—	—	2	1
Forgery .....	2	—	—	2	—
Homicide:					
Manslaughter .....	1	—	—	1	—
Larceny .....	4	—	2	2	—
Lewd, lascivious and indecent assault .....	1	—	1	—	—

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	1	—	—	—	—
Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	5	—	—	—	—
Other cases not enumerated .....	1	—	—	—	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

## THIRD JUDICIAL CIRCUIT

Columbia County  
Dixie County  
Hamilton County  
Lafayette County

Madison County  
Suwannee County  
Taylor County

COLUMBIA:	(A)	(B)	(C)	(D)	(E)
Adultery .....	1	—	—	—	—
Aggravated assault .....	—	—	—	2	—
Arson .....	—	1	—	—	—
Assault with intent to commit a felony .....	7	9	3	—	1
Attempt to commit a felony .....	1	2	—	1	—
Breaking and entering .....	21	3	4	16	—
Embezzlement .....	4	1	2	—	—
False pretense .....	5	—	—	2	—
Forgery .....	6	—	1	5	—
Homicide:					
Murder, first degree .....	6	—	—	—	3
Murder, second degree .....	1	—	—	1	1
Manslaughter .....	1	1	—	2	—
Larceny .....	28	13	4	14	—
Nonsupport or desertion .....	14	3	2	6	—
Robbery .....	1	2	—	—	1
Worthless checks and drafts .....	4	2	1	—	—
Miscellaneous crimes .....	—	5	—	—	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	2	—	—	—	—
Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	84	—	—	—	—
Habeas corpus hearings attended .....	2	—	—	—	—

DIXIE:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	—	—	—	1	—
Assault with intent to commit a felony .....	3	1	—	—	—
Attempt to commit a felony .....	1	—	—	—	1
Breaking and entering .....	1	3	—	—	1
False pretense .....	1	—	—	—	—
Forgery .....	1	1	—	1	—
Homicide:					
Manslaughter .....	—	1	—	—	—
Larceny .....	4	3	2	—	1
Nonsupport or desertion .....	12	—	—	3	—
Rape .....	1	—	1	—	—
Worthless checks and drafts .....	2	—	—	1	—
Miscellaneous crimes .....	4	3	—	1	—

## OTHER CASES HANDLED

Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	48	—	—	—	—
Habeas corpus hearings attended .....	4	—	—	—	—

- (A) Indictments and Informations.  
(B) No True Bills and No Informations.  
(C) Nolle Prosequi.  
(D) Convictions.  
(E) Acquittals.

HAMILTON:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	4	1	2	3	1
Assault with intent to commit a felony .....	11	8	1	3	—
Attempt to commit a felony .....	1	4	—	1	—
Breaking and entering .....	8	10	2	3	—
Conspiracy .....	1	1	—	—	—
Embezzlement .....	2	1	—	—	1
False pretense .....	3	—	—	—	—
Forgery .....	6	—	—	4	—
Homicide:					
Murder, first degree .....	3	—	—	2	1
Murder, second degree .....	1	—	—	—	—
Manslaughter .....	1	1	—	1	1
Liquor .....	4	1	—	—	—
Larceny .....	13	8	—	3	2
Nonsupport or desertion .....	16	2	5	10	—
Perjury .....	1	—	1	—	—
Receiving stolen property .....	3	—	—	1	1
Robbery .....	—	1	—	—	—
Worthless checks and drafts .....	2	—	—	2	—
Miscellaneous crimes .....	18	—	3	4	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	2	—	—	—	—
Criminal hearings attended .....	60	—	—	—	—

LAFAYETTE:	(A)	(B)	(C)	(D)	(E)
Attempt to commit a felony .....	1	—	—	—	—
Forgery .....	1	—	—	—	—
Homicide:					
Murder, first degree .....	1	1	—	—	—
Manslaughter .....	2	—	—	2	—
Larceny .....	5	—	1	2	1
Nonsupport or desertion .....	10	—	—	4	—
Rape .....	2	1	—	2	—
Worthless checks and drafts .....	1	—	—	—	—
Miscellaneous Crimes .....	3	—	—	—	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	1	—	—	—	—
Criminal hearings attended .....	24	—	—	—	—

MADISON:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	—	—	—	1	—
Arson .....	—	2	—	—	—
Assault with intent to commit a felony .....	8	5	2	2	—
Breaking and entering .....	13	2	—	7	—
Embezzlement .....	1	—	—	—	—
False pretense .....	4	—	2	1	—
Forgery .....	3	—	—	1	—
Homicide:					
Murder, first degree .....	1	—	—	—	—
Murder, second degree .....	1	—	—	1	—
Manslaughter .....	—	—	—	1	—
Liquor .....	—	3	—	—	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.



Larceny .....	18	—	—	7	4
Lottery .....	9	—	1	3	3
Nonsupport or desertion .....	10	—	3	1	—
Possession of burglarious tools .....	2	—	—	1	—
Receiving stolen property .....	4	—	—	1	—
Worthless checks and drafts .....	2	—	—	—	—
Miscellaneous Crimes .....	6	—	—	1	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	3	—	—	—	—
Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	48	—	—	—	—
Habeas corpus hearings attended .....	3	—	—	—	—

## SUWANNEE:

	(A)	(B)	(C)	(D)	(E)
Adultery .....	—	1	—	—	—
Aggravated assault .....	—	—	—	5	—
Assault with intent to commit a felony .....	11	—	1	4	—
Attempt to commit a felony .....	2	3	—	—	1
Breaking and entering .....	21	1	2	8	—
Crime against nature .....	2	—	—	—	—
Embezzlement .....	9	—	4	—	—
Extortion .....	—	1	—	—	—
False pretense .....	—	6	—	—	—
Forgery .....	4	1	—	7	1
Gambling .....	1	—	—	—	—
Homicide:					
Murder, first degree .....	2	—	—	—	—
Murder, second degree .....	—	—	—	2	—
Manslaughter .....	1	—	1	—	—
Larceny .....	25	7	4	19	1
Lottery .....	2	—	1	1	—
Nonsupport or desertion .....	5	—	1	—	—
Rape .....	1	1	1	—	—
Receiving stolen property .....	9	1	1	6	—
Resisting an officer .....	—	2	—	—	—
Robbery .....	1	—	—	—	—
Miscellaneous crimes .....	7	3	—	3	—
Worthless checks and drafts .....	6	3	3	1	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	3	—	—	—	—
Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	72	—	—	—	—

## TAYLOR:

	(A)	(B)	(C)	(D)	(E)
Adultery .....	—	1	—	—	—
Assault with intent to commit a felony .....	3	3	3	2	—
Attempt to commit a felony .....	1	—	—	—	—
Breaking and entering .....	22	3	1	6	—
Carnal intercourse with unmarried female .....	1	—	—	—	1
Embezzlement .....	7	—	—	2	—
Election Frauds .....	1	—	—	—	—
Forgery .....	4	—	—	—	—

(A) Indictments and Informations.

(B) No True Bills and No Informations.

(C) Nolle Prosequi.

(D) Convictions.

(E) Acquittals.

Homicide:					
Murder, first degree .....	1	—	—	—	—
Manslaughter .....	1	2	1	1	—
Larceny .....	11	6	6	4	—
Nonsupport or desertion .....	20	8	—	6	—
Receiving stolen property .....	2	2	—	—	—
Worthless checks and drafts .....	2	—	—	—	—
Miscellaneous crimes not otherwise listed.....	1	3	—	1	1

## OTHER CASES HANDLED

Bond estreature proceedings .....	4	—	—	—	—
Criminal hearings attended .....	72	—	—	—	—
Habeas corpus hearings attended .....	2	—	—	—	—

## FOURTH JUDICIAL CIRCUIT

## Clay County

## Nassau County

## Duval County

CLAY:	(A)	(B)	(C)	(D)	(E)
Adultery .....	—	1	—	—	—
Aggravated assault .....	1	1	—	1	—
Assault with intent to commit a felony.....	4	1	—	4	—
Attempt to commit a felony .....	2	—	1	1	—
Breaking and entering .....	16	—	4	11	1
Crime against nature .....	1	—	—	—	1
False pretense .....	1	—	—	1	—
Forgery .....	2	—	—	2	—
Homicide:					
Murder, first degree .....	1	—	—	1	—
Murder, second degree .....	3	—	—	2	—
Manslaughter .....	1	—	—	1	—
Larceny .....	22	—	3	16	3
Lewd, lascivious and indecent assault .....	3	—	2	—	1
Nonsupport or desertion .....	3	3	—	3	—
Robbery .....	4	—	2	2	—
Miscellaneous crimes .....	4	—	1	2	—

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	1	—	—	—	—
Bond estreature proceedings .....	11	—	—	—	—
Criminal hearings attended .....	60	—	—	—	—
Other cases not enumerated .....	20	—	—	—	—

DUVAL:	(A)	(B)	(C)	(D)	(E)
Arson .....	1	—	—	—	—
Assault with intent to commit a felony.....	3	—	—	—	—
Homicide:					
Murder, first degree .....	22	—	1	16	3
Murder, second degree .....	19	—	—	—	—
Manslaughter .....	17	—	—	—	—
Perjury .....	1	—	—	—	—
Rape .....	3	—	—	2	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

## OTHER CASES HANDLED

Appeals from lower court to circuit court.....	5	—	—	—	—
Bond estreature proceedings .....	58	—	—	—	—
Bond validation proceedings .....	5	—	—	—	—
Criminal hearings attended .....	118	—	—	—	—
Habeas corpus hearings attended .....	27	—	—	—	—
Other cases not enumerated .....	98	—	—	—	—

NASSAU:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	1	1	1	—	—
Arson .....	1	—	—	—	1
Assault with intent to commit a felony.....	18	1	2	13	2
Attempt to commit a felony .....	1	—	1	—	—
Breaking and entering .....	26	3	2	23	1
Embezzlement .....	—	1	—	—	—
Forgery .....	4	1	—	3	—
Homicide:					
Murder, first degree .....	3	1	—	2	—
Murder, second degree .....	2	—	—	1	1
Manslaughter .....	—	1	—	—	—
Larceny .....	32	3	5	25	2
Lewd, lascivious and indecent assault .....	1	—	—	1	—
Receiving stolen property .....	1	—	—	—	1
Robbery .....	1	—	—	1	—
Miscellaneous crimes .....	4	—	2	1	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	6	—	—	—	—
Bond validation proceedings .....	3	—	—	—	—
Criminal hearings attended .....	76	—	—	—	—
Habeas corpus hearings attended .....	4	—	—	—	—
Other cases not enumerated .....	27	—	—	—	—

## FIFTH JUDICIAL CIRCUIT

Citrus County  
Hernando County

Lake County  
Marion County

Sumter County

CITRUS:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony .....	2	—	2	2	—
Breaking and entering .....	2	—	6	4	—
Homicide:					
Murder, first degree .....	4	1	—	1	1
Manslaughter .....	—	—	—	1	—
Larceny .....	2	—	3	3	—
Lewd, lascivious and indecent assault .....	3	—	—	3	—
Nonsupport or desertion .....	1	—	6	1	—

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	1	—	—	—	—
Criminal hearings attended .....	30	—	—	—	—
Habeas corpus hearings attended .....	2	—	—	—	—

- (A) Indictments and Informations.  
(B) No True Bills and No Informations.  
(C) Nolle Prosequi.  
(D) Convictions.  
(E) Acquittals.

HERNANDO:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony .....	9	1	2	10	—
Breaking and entering .....	1	—	—	1	—
Enticing female from home for immoral purposes .....	1	2	—	—	—
Carnal intercourse with unmarried female .....	1	—	—	—	—
Hit and run .....	2	—	—	1	—
Homicide:					
Murder, first degree .....	—	1	—	—	—
Larceny .....	3	2	1	2	—
Nonsupport or desertion .....	3	—	1	2	—
Rape .....	1	—	—	—	—
Resisting an officer .....	2	—	—	2	—
Robbery .....	2	—	—	4	—

## OTHER CASES HANDLED

Criminal hearings attended .....	10	—	—	—	—
----------------------------------	----	---	---	---	---

LAKE:	(A)	(B)	(C)	(D)	(E)
Adultery .....	—	1	—	—	—
Arson .....	1	—	—	—	—
Assault with intent to commit a felony .....	42	6	24	8	—
Breaking and entering .....	30	—	11	14	—
Crime against nature .....	2	—	2	—	—
Carnal intercourse with unmarried female .....	1	1	1	—	—
Embezzlement .....	4	—	3	—	—
Conspiracy .....	1	—	1	—	—
False pretense .....	5	2	—	2	—
Forgery .....	20	3	2	7	—
Gambling Houses .....	1	1	3	—	—
Homicide:					
Murder, first degree .....	1	—	—	—	—
Murder, second degree .....	2	—	—	2	—
Manslaughter .....	5	—	2	3	—
Larceny .....	50	4	21	18	1
Lottery .....	6	1	3	1	—
Narcotics .....	1	—	—	1	—
Nonsupport or desertion .....	34	3	9	11	1
Rape .....	—	1	1	—	—
Receiving stolen property .....	2	3	2	—	—
Robbery .....	13	—	4	7	—
Worthless checks and drafts .....	12	4	6	2	—
Miscellaneous crimes .....	16	4	10	1	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	25	—	—	—	—
Criminal hearings attended .....	18	—	—	—	—
Other cases not enumerated .....	115	—	—	—	—

MARION:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	—	—	—	2	—
Arson .....	1	—	—	1	—
Assault with intent to commit a felony .....	10	2	3	5	—
Bastardy .....	—	2	—	—	—
Breaking and entering .....	20	1	10	21	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.



Embezzlement .....	1	—	1	—	—
Conspiracy .....	1	—	1	—	—
Forgery .....	8	—	2	9	—
Hit and run .....	1	—	—	1	—
Gambling Houses .....	1	—	1	1	—
Homicide:					
Murder, first degree .....	3	—	—	—	—
Murder, second degree .....	1	—	—	2	—
Manslaughter .....	3	—	—	2	1
Larceny .....	9	1	4	11	1
Lottery .....	3	—	1	4	1
Nonsupport or desertion .....	31	—	4	26	—
Rape .....	—	1	—	—	—
Receiving stolen property .....	2	—	—	1	—
Resisting an officer .....	1	—	—	—	—
Robbery .....	2	—	3	—	1
Worthless checks and drafts .....	2	—	—	2	—
Miscellaneous crimes .....	15	1	3	14	—

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	2	—	—	—	—
Bond estreature proceedings .....	9	—	—	—	—
Criminal hearings attended .....	50	—	—	—	—
Habeas corpus hearings attended .....	6	—	—	—	—

SUMTER:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony .....	1	—	1	1	—
Breaking and entering .....	3	2	5	8	—
Crime against nature .....	—	—	1	—	—
Embezzlement .....	—	2	2	—	—
Extortion .....	1	—	1	—	—
False pretense .....	1	—	—	—	—
Forgery .....	2	—	1	2	—
Homicide:					
Murder, first degree .....	1	—	1	1	—
Murder, second degree .....	—	—	—	1	—
Manslaughter .....	1	—	—	1	—
Larceny .....	10	—	5	4	1
Lottery .....	—	—	6	2	—
Nonsupport or desertion .....	1	3	1	—	—
Narcotics .....	—	—	—	1	—
Rape .....	1	—	—	—	—
Robbery .....	1	1	1	—	1

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	2	—	2	—	—
Other cases not enumerated .....	—	—	1	—	—

## SIXTH JUDICIAL CIRCUIT

## Pasco County

## Pinellas County

PASCO:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree .....	2	—	—	1	—
Manslaughter .....	—	—	—	1	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

PINELLAS COUNTY:	(A)	(B)	(C)	(D)	(E)
Adultery .....	1	—	—	1	—
Aggravated assault .....	—	—	—	5	—
Arson .....	3	—	—	2	—
Assault with intent to commit a felony .....	23	3	—	10	3
Attempt to commit a felony .....	3	2	—	2	—
Bastardy .....	—	2	—	2	—
Bigamy .....	2	1	1	1	—
Breaking and entering .....	74	4	3	65	3
Crime against nature .....	3	—	—	1	—
Embezzlement .....	18	8	1	13	1
Extortion .....	1	—	—	—	1
Forgery .....	79	1	3	77	—
Homicide:					
Murder, first degree .....	7	—	—	3	—
Murder, second degree .....	4	—	—	1	2
Manslaughter .....	3	3	—	2	1
Incest .....	1	—	—	2	—
Larceny .....	63	7	6	44	5
Lewd, lascivious and indecent assault .....	5	5	—	4	—
Lottery .....	16	—	1	12	—
Nonsupport or desertion .....	29	7	7	18	—
Possession of burglarious tools .....	—	1	—	—	—
Mayhem .....	1	—	—	1	—
Rape .....	4	4	—	3	1
Receiving stolen property .....	14	1	4	8	2
Narcotics .....	1	—	—	2	—
Resisting an officer .....	—	1	—	—	—
Perjury .....	1	—	—	—	—
Robbery .....	15	2	—	10	4
Worthless checks and drafts .....	16	5	1	13	1

## OTHER CASES HANDLED

Bond estreature proceedings .....	9	—	—	—	—
Bond validation proceedings .....	11	—	—	—	—
Criminal hearings attended .....	168	—	—	—	—
Habeas corpus hearings attended .....	5	—	—	—	—
Other cases not enumerated .....	13	11	2	5	—

## SEVENTH JUDICIAL CIRCUIT

Flagler County  
Putnam County

St. Johns County  
Volusia County

FLAGLER:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	3	—	1	2	—
Assault with intent to commit a felony .....	1	—	—	1	—
Breaking and entering .....	5	—	—	5	—
Embezzlement .....	1	—	—	1	—
Homicide:					
Murder, first degree .....	1	—	—	1	—
Murder, second degree .....	1	—	—	1	—
Manslaughter .....	4	1	—	3	1
Larceny .....	4	—	1	2	—
Lewd, lascivious and indecent assault .....	1	—	—	1	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

## OTHER CASES HANDLED

Criminal hearings attended, investigations .....	33	—	—	—	—
--	----	---	---	---	---

## PUTNAM COUNTY:

	(A)	(B)	(C)	(D)	(E)
Abortion .....	1	—	—	1	—
Aggravated assault .....	7	1	—	7	—
Assault with intent to commit a felony .....	9	—	—	4	—
Bigamy .....	5	—	3	2	—
Breaking and entering .....	51	10	2	41	—
Carnal knowledge .....	5	1	—	—	—
False pretense .....	9	2	—	3	4
Forgery .....	11	—	3	4	1
Hit and run .....	2	—	—	2	—
Bribery .....	1	—	—	1	—
Homicide:					
Murder, second degree .....	10	2	—	3	—
Manslaughter .....	11	1	2	6	1
Larceny .....	23	2	4	10	2
Lewd, lascivious and indecent assault .....	1	—	—	1	—
Lottery .....	3	—	—	2	—
Nonsupport or desertion .....	3	1	—	3	—
Rape .....	1	—	—	1	—
Unlawful practice of medicine .....	1	—	—	—	—
Worthless checks and drafts .....	6	1	1	2	1
Miscellaneous crimes .....	9	—	1	6	—

## OTHER CASES HANDLED

Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	4	—	—	—	—
Habeas corpus hearings attended .....	1	—	—	—	—
Other cases not enumerated .....	20	—	—	—	—

## ST. JOHNS:

	(A)	(B)	(C)	(D)	(E)
Adultery .....	1	—	—	—	—
Aggravated assault .....	8	—	1	5	1
Assault with intent to commit a felony .....	14	—	1	11	—
Attempt to commit a felony .....	2	—	2	1	—
Breaking and entering .....	31	—	—	25	1
Crime against nature .....	2	—	—	1	—
Embezzlement .....	5	—	3	1	—
Escape .....	9	—	1	6	—
Forgery .....	23	—	3	19	—
Homicide:					
Murder, first degree .....	5	—	—	3	2
Manslaughter .....	6	—	2	4	—
Larceny .....	29	—	12	14	1
Lewd, lascivious and indecent assault .....	4	—	2	1	—
Liquor .....	1	—	—	—	—
Mayhem .....	3	—	2	1	—
Nonsupport or desertion .....	4	—	—	3	—
Receiving stolen property .....	2	—	2	—	—
Robbery .....	3	—	—	3	—

(A) Indictments and Informations.

(B) No True Bills and No Informations.

(C) Nolle Prosequi.

(D) Convictions.

(E) Acquittals.

## OTHER CASES HANDLED

Bond estreature proceedings .....	1	—	—	—	—
Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	16	—	—	—	—
Other cases not enumerated .....	8	—	1	4	—

## VOLUSIA COUNTY:

	(A)	(B)	(C)	(D)	(E)
Adultery .....	2	2	—	—	2
Aggravated assault .....	5	—	1	4	—
Arson .....	2	—	2	—	—
Assault with intent to commit a felony .....	9	5	1	7	1
Attempt to commit a felony .....	3	2	3	—	—
Bastardy .....	6	—	—	4	2
Breaking and entering .....	57	2	3	54	—
Crime against nature .....	1	—	—	1	—
Embezzlement .....	12	5	1	5	—
Enticing female from home for immoral purposes .....	1	—	—	1	—
False pretense .....	1	1	—	1	—
Forgery .....	23	5	—	23	—
Hit and run .....	1	—	—	1	—
Homicide:					
Murder, first degree .....	8	—	1	6	—
Murder, second degree .....	1	—	—	—	—
Manslaughter .....	7	6	—	6	—
Larceny .....	30	19	5	23	—
Lewd, lascivious and indecent assault .....	4	2	—	1	—
Nonsupport or desertion .....	—	1	—	—	—
Rape .....	1	—	1	—	—
Receiving stolen property .....	6	—	—	6	—
Resisting an officer .....	1	1	—	1	—
Robbery .....	3	—	2	1	—
Worthless checks and drafts .....	35	2	1	34	—
Miscellaneous cases .....	15	8	2	11	5

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	94	—	—	—	—
Bond validation proceedings .....	2	—	—	—	—
Criminal hearings attended .....	357	—	—	—	—
Habeas corpus hearings attended .....	114	—	—	—	—
Other cases not enumerated .....	17	—	—	—	—

## EIGHTH JUDICIAL CIRCUIT

Alachua County  
Baker County  
Bradford County

Gilchrist County  
Levy County  
Union County

## ALACHUA:

	(A)	(B)	(C)	(D)	(E)
Adultery .....	1	3	1	—	—
Aggravated assault .....	3	7	2	2	—
Assault with intent to commit a felony .....	10	9	2	6	1
Breaking and entering .....	25	7	—	20	—

- (A) Indictments and Informations.  
(B) No True Bills and No Informations.  
(C) Nolle Prosequi.  
(D) Convictions.  
(E) Acquittals.



Crime against nature .....	—	6	—	—	—
Embezzlement .....	3	1	1	—	—
Extortion .....	1	—	1	—	—
False Pretense .....	—	1	—	—	—
Forgery .....	13	4	—	8	—
Homicide:					
Murder, first degree .....	5	—	—	2	—
Murder, second degree .....	2	—	—	2	—
Manslaughter .....	3	1	—	3	—
Larceny .....	30	6	—	23	—
Lottery .....	2	2	—	2	—
Nonsupport or desertion .....	7	12	—	5	—
Robbery .....	3	2	—	3	—
Worthless checks and drafts .....	10	3	6	3	—
Misc. crimes not otherwise listed .....	9	16	—	9	—

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	7	—	—	—	—
Bond validation proceedings .....	2	—	—	—	—
Bond estreature proceedings .....	1	—	—	—	—
Criminal hearings attended .....	20	—	—	—	—
Habeas corpus hearings attended .....	12	—	—	—	—

BAKER:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	3	4	—	—	—
Arson .....	1	—	—	1	—
Assault with intent to commit a felony .....	3	3	—	3	—
Breaking and entering .....	3	5	1	2	—
False pretense .....	2	2	1	1	—
Forgery .....	1	—	—	1	—
Larceny .....	1	1	—	1	—
Nonsupport or desertion .....	8	3	2	3	—
Receiving stolen property .....	3	—	1	2	—
Worthless checks and drafts .....	2	—	—	2	—
Miscellaneous crimes not otherwise listed .....	1	1	—	1	—

## OTHER CASES HANDLED

Criminal hearings attended .....	9	—	—	—	—
Habeas corpus hearings attended .....	3	—	—	—	—

BRADFORD:	(A)	(B)	(C)	(D)	(E)
Adultery .....	—	1	—	—	—
Aggravated assault .....	6	—	1	4	—
Assault with intent to commit a felony .....	—	2	—	—	—
Attempt to commit a felony .....	1	—	—	1	—
Breaking and entering .....	4	4	1	3	—
Forgery .....	6	—	—	5	—
Homicide:					
Manslaughter .....	1	—	—	—	—
Larceny .....	4	2	—	4	—
Nonsupport or desertion .....	3	2	—	2	—
Robbery .....	1	—	1	—	—
Misc. crimes not otherwise listed .....	6	4	—	6	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	2	—	—	—	—
Bond estreature proceedings .....	4	—	—	—	—
Criminal hearings attended .....	10	—	—	—	—
Habeas corpus hearings attended .....	6	—	—	—	—

GILCHRIST:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony .....	2	—	1	1	—
Attempt to commit a felony .....	—	1	—	—	—
Breaking and entering .....	3	—	—	3	—
Forgery .....	5	—	—	5	—
Homicide:					
Murder, first degree .....	1	—	—	—	—
Larceny .....	4	1	—	3	1
Nonsupport or desertion .....	4	—	—	3	—
Receiving stolen property .....	1	—	—	1	—
Robbery .....	2	—	1	1	—
Worthless checks and drafts .....	2	—	—	1	—

## OTHER CASES HANDLED

Criminal hearings attended .....	4	—	—	—	—
Habeas corpus hearings attended .....	2	—	—	—	—

LEVY:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	3	—	1	2	—
Assault with intent to commit a felony .....	4	—	—	2	—
Breaking and entering .....	3	—	—	2	—
Carnal intercourse with unmarried female .....	1	—	—	—	—
Forgery .....	4	—	—	3	—
Homicide:					
Murder, second degree .....	1	—	—	1	—
Larceny .....	6	1	—	5	—
Nonsupport or desertion .....	2	—	—	2	—
Robbery .....	2	—	—	1	—
Worthless checks and drafts .....	1	—	—	1	—
Misc. crimes not otherwise listed .....	9	—	—	6	—

## OTHER CASES HANDLED

Criminal hearings attended .....	12	—	—	—	—
Habeas corpus hearings attended .....	3	—	—	—	—

UNION:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	2	1	—	2	—
Assault with intent to commit a felony .....	—	2	—	—	—
Breaking and entering .....	3	—	—	3	—
False pretense .....	—	2	—	—	—
Homicide:					
Murder, first degree .....	1	—	—	—	—
Manslaughter .....	1	—	—	1	—
Larceny .....	6	—	—	6	—
Nonsupport or desertion .....	4	—	—	3	—
Robbery .....	2	—	—	2	—
Worthless checks and drafts .....	2	—	—	2	—
Misc. crimes not otherwise listed .....	4	—	—	3	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

## OTHER CASES HANDLED

Criminal hearings attended .....	7	—	—	—	—
Habeas corpus hearings attended .....	4	—	—	—	—

## NINTH JUDICIAL CIRCUIT

Brevard County  
Indian River County  
Martin County  
Okeechobee County

Orange County  
Osceola County  
St. Lucie County  
Seminole County

## BREVARD:

(No report submitted in time for publication.)

## INDIAN RIVER:

(No report submitted in time for publication.)

## MARTIN:

(No report submitted in time for publication.)

## OKEECHOBEE:

(No report submitted in time for publication.)

ORANGE:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree .....	6	—	—	1	—
Murder, second degree .....	—	—	—	3	—
Rape .....	1	—	—	—	1
Misc. crimes .....	—	3	—	—	10

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	2	—	—	—	—
Bonded validation proceedings .....	5	—	—	—	—
Criminal hearings attended .....	1	—	—	—	—
Habeas corpus hearings attended .....	16	—	—	—	—

OSCEOLA:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	—	—	—	1	—
Assault with intent to commit a felony .....	10	—	1	5	—
Breaking and entering .....	8	—	—	6	1
Carnal intercourse with unmarried female .....	1	—	—	1	—
False pretense .....	1	—	—	—	—
Forgery .....	17	—	—	10	—
Homicide:					
Murder, first degree .....	2	—	1	—	—
Murder, second degree .....	2	—	—	1	—
Manslaughter .....	2	—	—	2	—
Larceny .....	9	—	—	7	1
Mayhem .....	2	—	2	—	—

- (A) Indictments and Informations.  
(B) No True Bills and No Informations.  
(C) Nolle Prosequi.  
(D) Convictions.  
(E) Acquittals.

Receiving stolen property .....	1	—	—	1	—
Worthless checks and drafts .....	9	—	—	4	—
Misc. crimes .....	1	—	—	1	—

## OTHER CASES HANDLED

Bond validation proceedings .....	3	—	—	—	—
Habeas corpus hearings attended .....	5	—	—	—	—

## ST. LUCIE:

(No report submitted in time for publication.)

## SEMINOLE:

	(A)	(B)	(C)	(D)	(E)
Attempt to commit a felony .....	37	—	2	27	—
Breaking and entering .....	18	—	2	11	—
Enticing female from home for immoral purposes .....	1	—	1	—	—
False pretense .....	3	—	1	1	1
Forgery .....	5	—	1	3	1
Homicide:					
Murder, first degree .....	2	—	—	1	1
Manslaughter .....	1	—	—	—	1
Incest .....	1	—	1	—	—
Larceny .....	16	—	1	11	—
Lottery .....	9	—	2	7	—
Nonsupport or desertion .....	25	—	19	—	—
Narcotics .....	3	—	—	3	—
Rape .....	1	—	—	—	1
Receiving stolen property .....	1	—	—	1	—
Resisting an officer .....	1	—	—	1	—

## OTHER CASES HANDLED

Appeal from lower court to circuit court .....	4	—	—	—	—
Bond estreature proceedings .....	2	—	—	—	—
Criminal hearings attended .....	18	—	—	—	—
Other cases not enumerated .....	18	—	—	—	—

## TENTH JUDICIAL CIRCUIT

Hardee County

Polk County

Highland County

## HARDEE:

(No report submitted in time for publication.)

## HIGHLANDS:

(No report submitted in time for publication.)

## POLK:

(No report submitted in time for publication.)

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.



HARDEE:	(A)	(B)	(C)	(D)	(E)
Adultery .....	2	—	—	2	—
Aggravated assault .....	15	—	—	15	—
Assault with intent to commit a felony .....	26	—	5	18	2
Breaking and entering .....	5	—	1	4	—
Embezzlement .....	1	—	—	—	—
Forgery .....	4	—	—	—	—
Gambling houses .....	1	—	—	—	—
Homicide:					
Murder, first degree .....	1	—	—	1	—
Liquor .....	7	—	—	7	—
Nonsupport or desertion .....	4	—	2	—	—
Misc. crimes not otherwise listed .....	7	—	1	4	—

## OTHER CASES HANDLED

Bond validation proceedings .....	4	—	—	—	—
Bond estreature proceedings .....	6	—	—	—	—
Criminal hearings attended .....	8	—	—	—	—

HIGHLANDS:	(A)	(B)	(C)	(D)	(E)
Adultery .....	4	2	—	2	—
Aggravated assault .....	51	6	—	47	4
Assault with intent to commit a felony .....	36	—	—	34	2
Breaking and entering .....	27	—	—	21	1
Carnal intercourse with unmarried female .....	1	—	—	1	—
Forgery .....	11	—	—	11	—
Gambling houses .....	1	—	—	1	—
Homicide:					
Murder, first degree .....	1	—	—	—	—
Murder, second degree .....	3	—	—	2	1
Manslaughter .....	4	—	—	3	—
Larceny .....	20	—	—	15	2
Lottery .....	16	—	—	14	—
Nonsupport or desertion .....	7	—	—	—	—
Rape .....	5	—	1	1	1
Robbery .....	4	—	—	4	—
Misc. crimes not otherwise listed .....	11	—	—	11	—

## OTHER CASES HANDLED

Appeal from lower court to circuit court .....	4	—	—	—	—
Bond validation proceedings .....	8	—	—	—	—
Criminal hearings attended .....	15	—	—	—	—
Habeas corpus hearings attended .....	8	—	—	—	—

POLK:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree .....	32	—	1	23	—
Murder, second degree .....	2	—	—	—	—
Rape .....	4	—	—	2	2

## OTHER CASES HANDLED

Appeal from lower court to circuit court .....	62	—	—	—	—
Bond validation proceedings .....	14	—	—	—	—
Bond estreature proceedings .....	2	—	—	—	—

(A) Indictments and Informations.

(B) No True Bills and No Informations.

(C) Nolle Prosequi.

(D) Convictions.

(E) Acquittals.

Criminal hearings attended .....	11	—	—	—	—
Habeas corpus hearings attended .....	10	—	—	—	—
Other cases not enumerated .....	18	—	—	—	—

## ELEVENTH JUDICIAL CIRCUIT

Dade County	Monroe County				
DADE:	(A)	(B)	(C)	(D)	(E)
Assault and battery .....	—	—	—	2	—
Assault with intent to commit a felony .....	3	—	—	3	—
Bastardy .....	—	—	5	2	1
Homicide:					
Murder, first degree .....	26	3	2	8	7
Murder, second degree .....	4	—	—	5	—
Manslaughter .....	3	—	—	7	—
Larceny .....	1	—	—	—	—
Rape .....	16	8	2	7	3
Robbery .....	1	—	—	—	—

## OTHER CASES HANDLED

Appeals to supreme court .....	5	—	—	—	—
Bond validation proceedings .....	15	—	—	—	—
Deaths investigated .....	152	—	—	—	—
Accidental .....		28			
Alcoholism .....		7			
Drownings .....		32			
Natural .....		40			
Suicides .....		45			
Justifiable—Coroner's verdict .....		18			
Excusable—Coroner's verdict .....		2			
Bound over second degree murder .....		2			
Bound over manslaughter .....		3			
Bound over first degree murder .....		18			
Discharged by justice of peace .....		9			
Declaratory judgment hearings attended .....					5
Disbarment proceedings .....					2
Extradition hearings attended .....					4
Habeas corpus hearings attended .....					49
Investigations—miscellaneous .....					2
Mental incompetents—guardian ad litem .....					6
Parole commission reports sent in .....					8
Proceedings to restore sanity .....					37
Rapes investigated .....					65

MONROE:	(A)	(B)	(C)	(D)	(E)
Homicide:					
Murder, first degree .....	5	—	—	4	1
Rape .....	2	—	—	1	—

## OTHER CASES HANDLED

Criminal hearings attended .....	18	—	—	—	—
Habeas corpus hearings attended .....	1	—	—	—	—
Miscellaneous investigations .....	7	—	—	—	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

## TWELFTH JUDICIAL CIRCUIT

Charlotte County  
Collier County  
DeSoto County  
Glades County

Hendry County  
Lee County  
Manatee County  
Sarasota County

Reports cover only year of 1948.

CHARLOTTE:	(A)	(B)	(C)	(D)	(E)
Attempt to commit a felony .....	1	—	—	1	—
Breaking and entering .....	6	—	—	6	—
Forgery .....	1	—	—	1	—
Receiving stolen property .....	1	—	—	1	—

## OTHER CASES HANDLED

Criminal hearings attended .....	3	—	—	—	—
----------------------------------	---	---	---	---	---

COLLIER:	(A)	(B)	(C)	(D)	(E)
Breaking and entering .....	3	—	—	3	—
Carnal intercourse with unmarried female .....	1	—	—	—	1
Homicide:					
Murder, first degree .....	1	—	—	1	—
Murder, second degree .....	1	—	—	1	—
Larceny .....	2	—	—	1	1

## OTHER CASES HANDLED

Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	2	—	—	—	—

DeSOTO:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony .....	4	—	2	2	—
Breaking and entering .....	4	—	—	3	1
Carnal intercourse with unmarried female .....	2	—	—	—	1
Embezzlement .....	1	—	—	—	—
Forgery .....	6	—	—	6	—
Larceny .....	1	—	—	—	—
Receiving stolen property .....	1	—	—	1	—
Worthless checks and drafts .....	1	—	—	—	—

## OTHER CASES HANDLED

Criminal hearings attended .....	8	—	—	—	—
----------------------------------	---	---	---	---	---

GLADES:	(A)	(B)	(C)	(D)	(E)
Breaking and entering .....	3	—	—	3	—
Homicide:					
Murder, first degree .....	1	—	—	—	—
Murder, second degree .....	1	—	—	—	—
Larceny .....	1	—	—	1	—
Receiving stolen property .....	1	—	1	—	—
Misc. crimes not otherwise listed .....	2	—	—	1	—

- (A) Indictments and Informations.  
(B) No True Bills and No Informations.  
(C) Nolle Prosequi.  
(D) Convictions.  
(E) Acquittals.

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	1	—	—	—	—
Criminal hearings attended .....	3	—	—	—	—
Habeas corpus hearings attended .....	1	—	—	—	—

HENDRY:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	1	—	—	1	—
Breaking and entering .....	2	—	—	—	—
False pretense .....	1	—	—	1	—
Forgery .....	2	—	—	1	—
Homicide:					
Murder, second degree .....	2	—	—	2	—
Larceny .....	1	—	—	—	—

## OTHER CASES HANDLED

Criminal hearings attended .....	2	—	—	—	—
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LEE:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony .....	2	—	—	2	—
Breaking and entering .....	17	—	—	15	2
Embezzlement .....	1	—	—	—	—
Forgery .....	4	—	—	2	—
Larceny .....	19	—	1	18	—
Nonsupport or desertion .....	1	—	—	1	—
Robbery .....	6	—	—	5	1

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	3	—	—	—	—
Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	23	—	—	—	—
Inquests and investigations .....	12	—	—	—	—

MANATEE:	(A)	(B)	(C)	(D)	(E)
Assault with intent to commit a felony .....	4	—	—	4	—
Breaking and entering .....	15	—	—	15	—
Embezzlement .....	3	—	2	—	1
False pretense .....	1	—	—	—	—
Forgery .....	12	—	—	12	—
Larceny .....	15	—	1	14	—
Nonsupport or desertion .....	2	—	—	—	—
Receiving stolen property .....	1	—	—	1	—
Worthless checks and drafts .....	1	—	—	1	—
Misc. crimes not otherwise listed .....	3	—	—	3	—

## OTHER CASES HANDLED

Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	20	—	—	—	—
Habeas corpus hearings attended .....	4	—	—	—	—

SARASOTA:	(A)	(B)	(C)	(D)	(E)
Adultery .....	1	—	—	1	—
Assault with intent to commit a felony .....	4	—	1	3	—
Breaking and entering .....	24	—	1	20	3

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.



False pretense .....	1	—	—	1	—
Forgery .....	16	—	3	13	—
Homicide:					
Murder, second degree .....	1	—	—	1	—
Larceny .....	10	—	—	10	—
Receiving stolen property .....	1	—	—	—	—
Robbery .....	1	—	—	1	—
Worthless checks and drafts .....	4	2	—	2	—
Misc. crimes not otherwise listed .....	1	—	—	1	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	1	—	—	—	—
Bond validation proceedings .....	1	—	—	—	—
Criminal hearings attended .....	12	—	—	—	—
Habeas corpus hearings attended .....	2	—	—	—	—

## THIRTEENTH JUDICIAL CIRCUIT

## Hillsborough County

## HILLSBOROUGH:

(No report submitted in time for publication.)

## FOURTEENTH JUDICIAL CIRCUIT

Bay County  
Calhoun County  
Gulf County

Holmes County  
Jackson County  
Washington County

BAY:	(A)	(B)	(C)	(D)	(E)
Adultery .....	4	—	—	2	2
Aggravated assault .....	20	4	10	7	4
Arson .....	3	—	—	3	—
Assault with intent to commit a felony .....	36	—	19	24	3
Breaking and entering .....	28	9	8	13	1
Carnal intercourse with unmarried female .....	1	—	—	—	1
Embezzlement .....	7	6	—	4	—
Election frauds .....	1	—	—	1	—
False pretense .....	—	2	—	—	—
Forgery .....	13	3	—	8	—
Gambling houses .....	9	—	—	3	1
Homicide:					
Murder, first degree .....	2	—	—	1	—
Murder, second degree .....	3	—	—	1	—
Manslaughter .....	8	—	1	2	3
Larceny .....	63	11	—	25	5
Nonsupport or desertion .....	35	11	6	11	2
Rape .....	1	—	—	—	—
Robbery .....	8	1	2	4	1
Worthless checks and drafts .....	10	5	—	4	4
Misc. crimes not otherwise listed .....	14	2	—	6	—

- (A) Indictments and Informations.  
(B) No True Bills and No Informations.  
(C) Nolle Prosequi.  
(D) Convictions.  
(E) Acquittals.

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	5	—	—	—	—
Criminal hearings attended .....	20	—	—	—	—
Habeas corpus hearings attended .....	5	—	—	—	—
Other cases not enumerated .....	25	—	—	—	—

CALHOUN:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	5	1	1	2	2
Assault with intent to commit a felony .....	3	—	1	5	1
Breaking and entering .....	5	—	—	4	1
Embezzlement .....	1	—	—	1	—
False pretense .....	—	1	—	—	—
Forgery .....	1	—	—	1	—
Homicide:					
Murder, second degree .....	—	3	—	1	1
Manslaughter .....	—	—	—	1	1
Larceny .....	13	—	1	3	6
Nonsupport or desertion .....	1	—	2	1	—
Rape .....	1	—	—	—	1
Robbery .....	1	—	—	—	—

## OTHER CASES HANDLED

Bond validation proceedings .....	2	—	—	—	—
Criminal hearings attended .....	3	—	—	—	—
Habeas corpus hearings attended .....	1	—	—	—	—
Other cases not enumerated .....	6	1	6	4	1

GULF:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	3	—	1	1	1
Arson .....	1	—	—	—	—
Attempt to commit a felony .....	3	—	—	2	1
Breaking and entering .....	8	—	1	6	1
Embezzlement .....	1	—	—	1	—
Homicide:					
Murder, first degree .....	1	—	—	—	1
Murder, second degree .....	2	—	—	1	1
Manslaughter .....	1	—	—	—	1
Lottery .....	5	—	1	4	—
Nonsupport or desertion .....	2	—	—	1	—
Resisting an officer .....	1	—	—	1	—
Robbery .....	2	—	—	1	1

## OTHER CASES HANDLED

Bond estreatment proceedings .....	3	—	—	—	—
Criminal hearings attended .....	3	—	—	—	—
Other cases not enumerated .....	3	—	—	—	1

HOLMES:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	1	—	—	1	—
Assault with intent to commit a felony .....	3	3	1	2	—
Breaking and entering .....	3	—	—	2	—
Forgery .....	2	—	—	—	—
Homicide:					
Manslaughter .....	2	—	1	1	—

(A) Indictments and Informations.

(B) No True Bills and No Informations.

(C) Nolle Prosequi.

(D) Convictions.

(E) Acquittals.

Larceny .....	2	3	—	2	—
Lewd, lascivious and indecent assault .....	1	—	—	1	—
Nonsupport or desertion .....	9	2	—	5	—

## OTHER CASES HANDLED

Other cases not enumerated .....	4	—	—	2	—
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JACKSON:	(A)	(B)	(C)	(D)	(E)
Adultery .....	2	—	—	2	—
Aggravated assault .....	7	—	3	5	1
Arson .....	—	1	—	—	—
Attempt to commit a felony .....	12	3	—	8	1
Bigamy .....	2	—	—	1	—
Breaking and entering .....	55	1	1	35	7
Carnal intercourse with unmarried female .....	4	—	1	2	1
Embezzlement .....	2	2	1	—	—
False pretense .....	2	1	—	1	—
Forgery .....	10	—	—	5	—
Hit and run .....	1	—	—	1	—
Homicide:					
Murder, first degree .....	1	—	—	—	—
Murder, second degree .....	1	—	—	1	—
Manslaughter .....	6	—	1	5	1
Larceny .....	37	3	4	18	10
Lottery .....	1	4	—	1	—
Nonsupport or desertion .....	—	27	3	19	1
Rape .....	2	—	—	2	—
Resisting an officer .....	1	—	—	1	—
Robbery .....	4	—	—	2	1
Worthless checks and drafts .....	2	—	1	1	—
Misc. crimes not otherwise listed .....	5	—	—	3	2

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	8	—	—	—	—
Criminal hearings attended .....	7	—	—	—	—
Habeas corpus hearings attended .....	2	—	—	—	—

WASHINGTON:	(A)	(B)	(C)	(D)	(E)
Adultery .....	4	—	—	—	—
Aggravated assault .....	5	—	—	5	—
Assault with intent to commit a felony .....	8	5	1	7	1
Carnal intercourse with unmarried female .....	1	—	1	—	—
Embezzlement .....	1	—	—	—	—
False pretense .....	2	1	—	2	—
Forgery .....	8	1	—	7	—
Homicide:					
Murder, first degree .....	7	—	1	1	—
Murder, second degree .....	1	—	—	4	—
Manslaughter .....	5	—	—	4	1
Larceny .....	22	2	4	6	9
Lewd, lascivious and indecent assault .....	2	—	1	1	—
Nonsupport or desertion .....	18	3	6	13	—
Perjury .....	—	1	—	—	—
Rape .....	2	—	—	—	—
Robbery .....	5	—	—	5	—
Misc. crimes not otherwise listed .....	14	1	2	2	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

## FIFTEENTH JUDICIAL CIRCUIT

## Broward County

## Palm Beach County

BROWARD:	(A)	(B)	(C)	(D)	(E)
Aggravated assault .....	2	—	—	2	—
Assault with intent to commit a felony .....	9	—	3	5	—
Breaking and entering .....	53	—	6	38	1
Crime against nature .....	1	—	—	1	—
Embezzlement .....	1	—	—	1	—
False pretense .....	1	—	—	—	—
Forgery .....	13	—	—	12	—
Homicide:					
Murder, first degree .....	14	2	—	1	2
Murder, second degree .....	5	—	—	4	1
Manslaughter .....	5	4	—	6	2
Larceny .....	31	—	3	26	—
Lewd, lascivious and indecent assault .....	5	—	2	3	—
Mayhem .....	1	—	—	—	1
Rape .....	3	—	1	2	1
Receiving stolen property .....	2	—	2	—	—
Robbery .....	12	—	1	3	—
Worthless checks and drafts .....	4	—	—	4	—

## OTHER CASES HANDLED

Bond estreature proceedings .....	1	—	—	—	—
Bond validation proceedings .....	2	—	—	—	—
Criminal hearings attended .....	44	—	—	—	—
Habeas corpus hearings attended .....	7	—	—	—	—
Other cases not enumerated .....	19	—	—	—	—

## PALM BEACH:

(No report submitted in time for publication.)

(A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.



# REPORTS OF COUNTY SOLICITORS FOR YEARS 1947-1948, INCLUSIVE

DADE:

## CRIMINAL COURT OF RECORD AND COURT OF CRIMES:

DADE:	(A)	(B)	(C)	(D)	(E)
Abortion .....	—	—	1	1	2
Adultery .....	—	6	13	4	—
Aggravated assault .....	—	4	67	98	63
Arson .....	—	—	2	8	3
Assault and battery .....	—	8	115	164	110
Assault with intent to commit a felony .....	—	11	21	18	16
Attempt to commit a felony .....	—	6	13	35	10
Bigamy .....	—	1	4	—	3
Breaking and entering .....	—	27	157	842	102
Crime against nature .....	—	1	8	8	5
Embezzlement .....	—	13	109	65	29
False pretense .....	—	4	29	10	4
Forgery .....	—	12	16	214	8
Gambling houses .....	—	6	12	282	6
Homicide:					
Murder, second degree .....	—	—	7	2	4
Manslaughter .....	—	5	7	11	16
Incest .....	—	—	1	—	1
Larceny .....	—	31	163	588	111
Narcotics .....	—	—	1	23	2
Nonsupport or desertion .....	—	4	42	16	1
Perjury .....	—	—	2	3	1
Rape .....	—	—	10	5	2
Receiving stolen property .....	—	1	21	32	13
Robbery .....	—	11	53	157	48
Misc. crimes not otherwise listed .....	—	103	284	2314	233

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	5	—	—	—	—
Appeals to supreme court .....	26	—	—	—	—
Bond estreatment proceedings .....	346	—	—	—	—
Other cases not enumerated .....	210	—	—	—	—

DUVAL:	(A)	(B)	(C)	(D)	(E)
Abortion .....	1	—	—	1	—
Adultery .....	5	—	—	3	—
Aggravated assault .....	45	2	—	42	3
Arson .....	8	—	—	7	1
Assault with intent to commit a felony .....	40	45	1	33	6
Attempt to commit a felony .....	17	9	1	14	2
Bigamy .....	3	1	—	3	—
Breaking and entering .....	221	39	5	200	16
Carnal intercourse with unmarried female .....	7	1	1	—	2
Crime against nature .....	2	1	—	2	—
Embezzlement .....	18	12	—	15	3

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

False pretense .....	5	2	—	5	—
Forgery .....	53	14	2	47	4
Homicide:					
Murder, second degree .....	4	—	—	4	—
Manslaughter .....	14	4	1	9	4
Liquor .....	58	17	1	53	4
Larceny .....	424	56	13	387	24
Narcotics .....	28	—	—	25	3
Nonsupport or desertion .....	12	16	—	11	—
Perjury .....	2	—	—	2	—
Receiving stolen property .....	32	3	4	21	7
Robbery .....	70	16	2	59	7
Worthless checks and drafts .....	50	17	3	47	—
Misc. crimes not otherwise listed .....	1308	164	6	1285	16

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	1	—	—	—	—
Habeas corpus hearings attended .....	11	—	—	—	—

## ESCAMBIA:

(No report submitted in time for publication.)

HILLSBOROUGH:	(A)	(B)	(C)	(D)	(E)
Accessory after the fact .....	4	1	—	2	—
Accessory before the fact .....	2	—	—	1	—
Affray .....	4	—	—	3	1
Aggravated assault .....	57	12	7	41	5
Assault and battery .....	51	25	8	35	2
Assault with intent to commit a felony .....	19	7	1	9	—
Attempt to commit a felony .....	18	5	3	6	2
Bigamy .....	1	—	—	2	—
Breaking and entering .....	218	14	9	165	18
Carnal intercourse with unmarried female .....	—	1	—	—	—
Crime against nature .....	5	—	—	4	—
Drunk .....	4342	29	172	1941	12
Embezzlement .....	36	5	3	26	4
Entering without breaking .....	19	—	11	14	—
Escape .....	21	—	—	19	—
Forgery .....	189	3	7	166	3
Gambling houses .....	6	1	—	—	7
Homicide:					
Murder, second degree .....	12	—	1	6	1
Manslaughter .....	19	4	—	7	2
Incest .....	7	—	1	1	1
Killing animal of another .....	—	1	—	—	—
Larceny .....	468	55	35	296	31
Motor vehicle violations .....	466	40	33	303	36
Lottery .....	8	7	1	—	3
Nonsupport or desertion .....	27	7	4	18	4
Perjury .....	2	—	1	—	1
Possession of burglarious tools .....	2	—	—	2	—
Prostitution .....	42	7	3	35	1
Receiving stolen property .....	28	13	3	19	7
Resisting an officer .....	12	1	2	6	—
Robbery .....	59	10	5	46	7

(A) Indictments and Informations.

(B) No True Bills and No Informations.

(C) Nolle Prosequi.

(D) Convictions.

(E) Acquittals.

Unlawful practice of medicine .....	1	—	2	—	1
Vagrancy .....	52	9	5	38	3
Worthless checks and drafts .....	73	1	1	74	3
Other cases not enumerated .....	151	37	24	84	13

MONROE:	(A)	(B)	(C)	(D)	(E)
Affray .....	1	—	—	1	—
Aggravated assault .....	7	—	1	6	—
Assault and Battery .....	26	—	5	16	5
Assault with intent to commit a felony .....	1	—	—	1	—
Attempt to commit a felony .....	2	—	—	2	—
Breaking and entering .....	19	—	—	16	4
Drunkenness .....	35	—	—	35	—
Entering without breaking .....	1	—	—	1	—
Forgery .....	1	—	—	1	—
Larceny .....	22	—	1	18	2
Nonsupport or desertion .....	1	—	—	1	—
Receiving stolen property .....	1	—	—	1	—
Reckless driving .....	70	—	5	44	2
Robbery .....	9	—	1	2	2
Vagrancy .....	35	—	2	32	1
Worthless checks and drafts .....	8	—	—	8	—
Other cases not enumerated .....	153	—	3	87	8

ORANGE:	(A)	(B)	(C)	(D)	(E)
Affray and assault and battery .....	42	—	—	42	—
Aggravated assault .....	16	—	—	16	—
Assault with intent to commit a felony .....	13	—	—	10	3
Bigamy .....	2	—	—	2	—
Breaking and entering .....	130	—	—	127	3
Crime against nature .....	1	—	—	1	—
Drunk .....	506	—	—	506	—
Embezzlement .....	1	—	—	1	—
Escape .....	5	—	—	5	—
Exhibiting deadly weapon .....	19	—	—	18	1
Fish and game law violation .....	46	—	—	45	1
Forgery .....	101	—	—	101	—
Gambling .....	23	—	—	19	4
Homicide:					
Murder, second degree .....	7	—	—	3	4
Manslaughter .....	7	—	—	3	4
Liquor—Bev. law violation .....	37	—	—	37	—
Larceny .....	111	—	—	110	1
Lewd, lascivious and indecent behavior .....	1	—	—	1	—
Narcotics .....	14	—	—	14	—
Nonsupport or desertion .....	11	—	—	11	—
Open profanity .....	1	—	—	1	—
Receiving stolen property .....	4	—	—	4	—
Robbery .....	4	—	—	3	1
Trespass .....	8	—	—	8	—
Motor vehicle violations .....	1839	—	—	1819	20
Worthless checks and drafts .....	60	—	—	60	—
Misc. crimes not otherwise listed .....	49	—	—	48	1

## OTHER CASES HANDLED

Criminal hearings attended .....	60	—	—	—	—
Habeas corpus hearings attended .....	23	—	—	—	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
 (D) Convictions.  
 (E) Acquittals.

PALM BEACH:	(A)	(B)	(C)	(D)	(E)
Adultery .....	35	—	14	13	—
Aggravated Assault .....	189	2	23	180	3
Arson .....	3	—	—	3	—
Assault and battery .....	68	4	9	61	—
Assault with intent to commit a felony .....	48	—	5	4	3
Attempt to commit a felony .....	28	—	4	24	—
Beating board bill .....	6	—	—	4	—
Breaking and entering .....	246	—	41	196	6
Concealed weapons .....	43	—	2	40	1
Crime against nature .....	19	—	6	9	—
Drunkenness .....	332	1	12	305	3
Embezzlement .....	11	—	4	5	2
Entering without breaking .....	19	—	2	15	—
False pretense .....	59	—	5	31	3
Forgery .....	54	—	3	35	—
Gambling .....	34	—	—	3	34
Homicide:					
Murder, first degree .....	1	—	—	—	—
Murder, second degree .....	13	—	5	—	2
Manslaughter .....	14	—	4	11	5
Indecent exposure .....	5	—	—	4	—
Liquor .....	9	—	1	3	2
Larceny .....	319	2	60	230	2
Narcotics .....	3	—	—	3	—
Nonsupport or desertion .....	86	—	18	59	3
Perjury .....	2	—	—	2	—
Receiving stolen property .....	32	—	12	12	—
Robbery .....	46	—	19	21	5
Worthless checks and drafts .....	78	—	6	56	—
Misc. crimes not otherwise listed .....	785	5	52	709	16

## PASCO:

(Report submitted incomplete.)

POLK:	(A)	(B)	(C)	(D)	(E)
Adultery .....	11	10	—	11	—
Aggravated assault .....	90	85	1	88	2
Arson .....	2	2	1	1	—
Assault with intent to commit a felony .....	17	31	1	15	1
Attempt to commit a felony .....	3	4	—	3	—
Carnal intercourse with unmarried female .....	2	3	1	1	—
Bigamy .....	2	—	—	2	—
Breaking and entering .....	64	18	—	62	2
Bribery .....	1	1	—	1	—
Crime against nature .....	3	2	—	3	—
Driving while intoxicated .....	168	9	—	168	—
Embezzlement .....	10	34	1	9	—
False pretense .....	1	7	—	1	—
Forgery .....	35	12	2	33	—
Gambling houses .....	145	12	—	145	—
Homicide:					
Murder, second degree .....	1	—	—	1	—
Manslaughter .....	6	4	1	5	—
Incest .....	1	—	—	1	—
Larceny .....	167	110	1	163	3

- (A) Indictments and Informations.  
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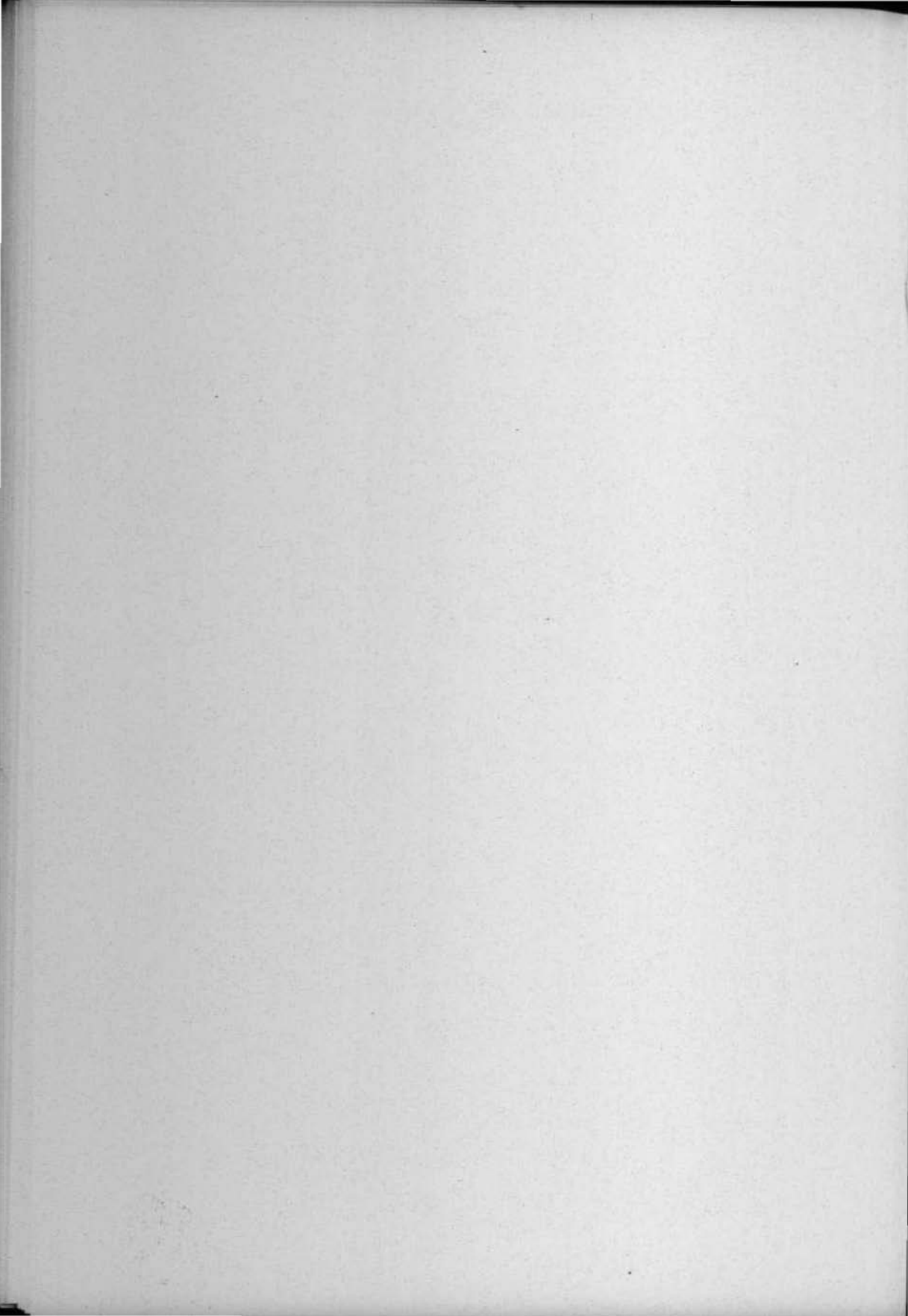
Liquor .....	209	91	6	189	14
Lottery .....	15	17	—	14	1
Mayhem .....	1	—	—	1	—
Motor vehicle violations .....	1127	132	1	1119	6
Nonsupport or desertion .....	25	44	—	25	—
Receiving stolen property .....	4	9	—	3	1
Robbery .....	6	4	—	6	—
Worthless checks and drafts .....	48	138	1	47	—
Misc. crimes not otherwise listed .....	3713	921	22	3681	9

## OTHER CASES HANDLED

Appeals from lower court to circuit court .....	4	—	—	—	—
Bond estreature proceedings .....	245	—	—	—	—
Criminal hearings attended .....	15	—	—	—	—
Habeas corpus hearings attended .....	3	—	—	—	—

- (A) Indictments and Informations.  
 (B) No True Bills and No Informations.  
 (C) Nolle Prosequi.  
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See: CONTROL, BOARD OF

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